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Case No.

In The

Supreme Court

Of The United States

October Term, 1983

DELORES DEVINES, *et al.*,
Petitioners,
v.
HENRY W. MAIER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the ruling of the Court below conflicts with this Court's prior holdings as a result of its misapplication of this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), so as to wrongfully deny petitioners[1] just compensation under the Fifth and Fourteenth Amendments for the losses they suffered as a result of the City of Milwaukee's requirement that they vacate their homes.

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1. The parties to the proceedings in the Court of Appeals were: Delores Devines, Antoinette Stokes, Sarita Beason, and Nick Sutherland, individually and on behalf of all others similarly situated, the appellees and cross-appellants, and Henry W. Maier, individually and in his official capacity as Mayor of the City of Milwaukee; Wallace Burkee, individually and in his official capacity as Director of the Community Development Agency; William Ryan Drew, individually and in his official capacity as Commissioner of the Department of City Development; Gerald Anderson, individually and in his official capacity as Department of City Development Relocation Officer; Leonard F. Sloane, individually and in his official capacity as Deputy Inspector of Buildings; and the City of Milwaukee appellants and cross-appellees.

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OPINIONS BELOW

The original opinion of the District Court is reported as *Devines v. Maier*, 494 F. Supp. 992 (E.D. Wis. 1980). That decision was reversed in part by the Court of Appeals and remanded in *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981), hereinafter *Devines I*. The unreported order and judgment of the District Court on remand, *Devines v. Maier*, C.A. No. 78-C-742 (E.D. Wis. Order and Judgment filed Jan. 21, 1983) is included in the Appendix. The opinion of the Court of Appeals overruling its first decision and reversing the order on remand, hereinafter *Devines II*, is reported at 728 F.2d 876 (7th Cir. 1984).

JURISDICTION OF THIS COURT

This court has jurisdiction under 28 U.S.C. §1254(1) to review the decision of the Court of Appeals for the Seventh Circuit which was rendered February 17, 1984. No rehearing was sought.[2] On May 2, 1984, Justice John Paul Stevens extended the time for filing this petition until June 30, 1984.

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2. This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of overruling *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981).
Devines v. Maier, 728 F.2d 876, fn. (7th Cir. 1983).
Of the three judges who made up the first panel that decided *Devines I*, none were in regular active service in 1983: one was deceased, one was on senior reserve status with the Sixth Circuit, and the third was on senior reserve status with the Seventh Circuit.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

United States Constitution, Fifth Amendment

. . . [N]or shall private property be taken for public use without just compensation. . . .

United States Constitution, Fourteenth Amendment

. . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

Statutes

The following statutes and ordinances, being lengthy, are reproduced in the Appendix at the indicated pages:

1. Wisconsin Statutes Authorizing Enforcement of Local Housing Codes, Wis. Stat. §62.17 . . . . . App.

2. Wisconsin Statutes Authorizing the Razing of Uninhabitable Premises, Wis. Stat. §66.05 . . . . . App.

3. Wisconsin Statute Governing Landlord and Tenant Responsibilities to Maintain, Wis. Stat. §704.07 . . . . . App.

4. Wisconsin Receivership Statute, Wis. Stats. §823.22 . . . . . App.

5. Statement of Purposes, Milwaukee's Housing Code, Milwaukee Code of Ordinances, Part 2 . . . . . App.

6. Milwaukee Housing Code, Milwaukee Code of Ordinances: . . . . . App.

a) 12–4 (1) – (3) . . . . . App.

b) 12–14 . . . . . App.

c) 12–17 . . . . . App.

d) 12–16 . . . . . App.

STATEMENT OF THE CASE

Petitioners and the class they represent are almost exclusively low-income households who rent substandard units in Milwaukee's Inner City. More often than not, they are members of racial minority groups, are large families headed by single women, or are elderly or disabled individuals. R. 11, ¶¶ 3 and 4; R. 41, pp. 15–16; R. 38, pp. 10–13; and R. 1, ¶ 32; R. 13, 5.[3] Due to these factors, petitioners necessarily rent premises which to some extent or another violate the City's housing code. *Devines I.*, 665 F.2d at 144. Simply put, they are economically and socially powerless to do otherwise.

The City of Milwaukee's housing code requires all rented residential premises to meet certain minimum standards of habitability. *Id.* at 145. This code authorizes the City to prohibit occupancy of premises that do not meet its requirements. However, in practice the City only prohibits occupancy where, in its judgment, the unit so seriously violates the code that it is uninhabitable.

Most of the conditions which make premises uninhabitable, in the City's view, are conditions caused by owners or landlords and for which the housing code makes them liable. R. 38, p. 24. Yet, when the City, in its discretion, decides a home is uninhabitable, the City summarily orders the petitioners to vacate their homes or face prosecution. *Devines I.*, 665 F.2d at 144; R. 28, p. 8.[4]

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3. All references to R. ____, now and hereinafter, are references to the record on appeal to the Seventh Circuit.

4. The city is empowered to utilize other methods of enforcing its code which are less drastic than summarily ordering petitioners to vacate their homes. These include administrative orders to make repairs, municipal court enforcement of those orders by fine or forfeiture, authorizing occupants to deposit their rent within the City until repairs are made, entering the premises and itself contracting for the needed repairs, or initiating receivership proceedings whereby the City itself can administer repairs. See Milwaukee Code of Ordinances, §§12–4(1)–3), 12–14, 12–17, 12–16, and §823.22, Wis. Stats., respectively at App. 179–189 and 175–177.

By summarily ordering petitioners to vacate their rented homes, the City seeks to force their landlords to comply with the city's code by depriving those owners of some part of their rent. However, in doing so, the City, for all practical purposes, completely destroys petitioners' sole interest in their property. *Devines II.*, 728 F.2d. at 878, *Devines I.*, 665 F.2d at 142, and *Devines v. Maier*, 494 F. Supp. at 994.

Petitioner Beason's allegedly temporary displacement on February 20, 1978, upon 72 hours notice, is a commonplace example of how permanent these losses are. As of November of 1979, almost 22 months later, the premises from which she was ordered remained boarded up and she has never been able to return. R. 1, ¶¶ 4, 53–55; R. 45.

As the district court found, tenants who are ordered out of their homes and who endure the disruption and expense of finding and moving to a new home also do not return to their old dwellings, even if they are repaired, and cannot be expected to do so. "Thus, for all practical purposes, tenants forced to relocate due to what the City terms 'temporary' code violations are put to the same trouble and expense as tenants who are forced to vacate a building which is scheduled to be razed." *Devines v. Maier*, 494 F. Supp. at 994.

This total loss forces petitioners to bear the entire burden of achieving the public purpose of the housing code by this method of enforcement. The cost to petitioners encompasses more than that of money. Petitioner Devines, for example, relocated herself and her 6 children with no money, no car and no assistance from the City, moving their personal belongings a distance of 4 miles, in the cold and snow, in a child's coaster wagon, making more than 20 round trips. R. 1, ¶¶ 4, 49–51, R. 45. In petitioner Stokes' case, she suffered the additional trauma of being charged in court with a violation of the order to vacate "immediately," a charge which carried with it the possibility of being fined up to $2,000.00 and being incarcerated if she failed to pay. R. 1, ¶¶ 4, 49–51; R. 45.

Yet, petitioners are the persons who are least able to afford the cost of providing this benefit for the community as a whole. R. 11, ¶¶ 3 and 4; R. 41, pp. 15–16; R. 38, pp.

10–13; R. 1, ¶ 32; and, [4]. 12, ¶ 5. Petitioners are also the least likely to receive any reciprocal benefit since the enforcement of the code reduces the housing stock available to them in Milwaukee (R. 39, pp. 14–15) and petitioners are unable to afford and are unlikely to relocate into completely code standard housing.

The District Court initially dismissed the petitioners' claim that the summary ordering of the petitioners from their rented residences was a loss for which the Fifth Amendment required compensation. *Devines v. Maier*, 494 F. Supp. 992, 995 (E.D. Wis. 1980).[5] The District Court acknowledged that petitioners had in fact suffered a permanent and total loss. *Id.*, at 994. However, the court denied compensation because, while petitioners were a more sympathetic group than their landlords, any loss suffered by landlords would be admittedly noncompensable and it saw no constitutionally significant difference between the losses suffered by either.

On appeal, the Seventh Circuit reversed this ruling. *Devines I.* Citing *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the court recognized that the question whether a regulation of private property results in a compensable taking demands an analysis of the extent to which the regulation interferes with the private rights. *Devines I.*, 665 F.2d at 141–42. Relying upon *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the court of appeals distinguished between landlords and petitioners by observing that, whereas landlords were left with significant residual property rights, the extinction of petitioners' right to occupy their rented premises completely destroyed the primary benefit of plaintiffs' leasehold interest. The impact of the regulation could not have been more severe since it left petitioners nothing. *Devines I.*, 665 F.2d at 142.

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5. Jurisdiction was invoked in the District Court pursuant to 28 U.S.C. §§1331, 1337, and 1343 (3) and (4).

The Court of Appeals also rejected the City's argument that, since the petitioners were prohibited by law from occupying units which did not comply with the city's code, the petitioners did not possess a legal right to occupy their unit and therefore the City's order to vacate did not result in interference with, or a loss of, a legal property interest of the petitioners. *Devines I.*, 665 F.2d at 143. The court observed that, if accepted, the City's argument would "obliterate the Fifth Amendment protection against regulatory takings that benefit the public at the expense of the individual." *Id.* The court then held that:

> The state may not severely limit or otherwise destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulations and therefore never existed. *Id.*

On remand, the district court entered a judgment which awarded petitioners reimbursement of moving expenses and any increased rental payment during the unexpired term of their lease, except where petitioners were found to have caused the conditions which resulted in the City's need to act. App. 126–127.

Appeals were taken to the Seventh Circuit again and the City requested a second review of the taking issue. Invoking an exception to the law of the case doctrine, a different Seventh Circuit panel overruled the decision of the prior panel and held that there was no taking. *Devines II.*, 728 F.2d at 886. It offered the explanation that this Court's intervening decisions in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S 419 (1982) made the decision of the prior panel clearly erroneous. *Devines II*, 728 F.2d at 886. Relying almost exclusively upon *Texaco v. Short*, 454 U.S. 516 (1982) which it said was dispositive, the *Devines II* panel held that *Texaco* absolved the City of the compensation requirement of the Fifth Amendment because it was not the government's fault that the petitioners lost their property. Rather, their loss resulted from the failure by either the petitioners or their landlords to discharge a government-imposed condition for the petitioners' retention of their property and was, therefore, noncompensable.

This case presents a fundamental question of constitutional law that must be, and can only be, answered by this Court. This question is whether government may, pursuant to the exercise of its police power, condition the continued existence of a constitutionally protected property interest without limitation, and, if there are constitutional limitations, what those may be. Given the many urban areas in this country where housing codes are used to promote the public welfare and the substantial numbers of low-income households similar to petitioners, this case is of sufficient impact to warrant consideration of its merits by the full Court.[6]

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6. See amicus briefs filed in *Devines II* by the Cities of Jacksonville, Florida and Kansas City, Missouri.

REASON FOR GRANTING THE WRIT

It is important that this Court review this decision by the Seventh Circuit Court of Appeals because it misapplies *Texaco v. Short*, 454 U.S. 516 (1982) so as to effectively nullify this Court's recent efforts to define the Fifth Amendment's applicability in the area of regulatory takings. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)., *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and, *San Diego Gas and Electric v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting).

A. The limitations placed on petitioners' property interest by the Court below constitute a compensable regulatory taking for which the Fifth Amendment requires compensation.

Devines I., 665 F.2d at 146. Under this Court's well established precedents, whether a governmental restriction upon property interests constitutes a taking of property for Fifth Amendment purposes depends, not upon a set formula, but upon an *ad hoc* factual inquiry into all the circumstances. *See, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123–24 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 174–75 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). As the Court of Appeals recognized in its initial decision, conducting such an inquiry in this case leads inevitably to the conclusion that the petitioners' property has been taken. *Devines I.*, 665 F.2d at 141–142.

Petitioners held leasehold interests in real estate Such interests have long been recognized as property protected by the takings clause. *See, e.g., United States v. Petty Motor Company*, 327 U.S. 818 (1946); *United States v. General Motors*, 323 U.S. 373 (1945); and *Reibs v. Milwaukee County Park Commission*, 252 Wis.2d 144, 31 N.W.2d 380 (1948). These premises served petitioners as their homes, the most sanctified property that members

of a civilized society can possess. *See, e.g., Greene v. Lindsey*, 456 U.S. 444, 450–451. (1982) ("Appellees have been deprived of a significant property interest, indeed the right to continued residence in their homes."); also, *see Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 94–95 (1980) (Marshall, J., concurring) and *Payton v. New York*, 445 U.S. 573, 601 (1980) for further affirmation of the importance of this interest. Petitioners' reasonable expectation, backed by their investment of time, effort, and their meager incomes in establishing the emotional and social bonds which comprise a neighborhood community, was that they would be allowed to continue to occupy their homes until and unless they breached the terms of their tenancies or their landlords decided to terminate or not to renew their tenancies pursuant to the notice and hearing requirements of state law.

The City destroyed this expectation when it deprived petitioners of their right to the continued occupancy of their homes. This right of occupancy and use is perhaps the most treasured strand in the bundle of rights which make up our commonly-accepted notions of property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[7] The City's destruction of petitioners' right to occupancy was utter and complete. They had nothing left.[8] Given the

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7. As the court recently observed in a slightly different context:
> Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order . . . .
> Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value. (Citations omitted.)

Dickman v. Commissioner of Internal Revenue _____ U.S._____, 104 S.Ct.1086, 1090 (1984).

8. Although the *Devines II* panel repeatedly labeled the City's orders to vacate "temporary," it did not reason that the extinguishment of petitioners' property interest was less than complete and thus, on

nature of the property (petitioners' homes), the importance of the right denied (the right to occupy and use), and the extent of the interference with that right (complete destruction), no factual inquiry into the totality of the circumstances can avoid the conclusion that a compensable taking has occurred.

Initially, the Seventh Circuit Court of Appeals correctly concluded that a compensable taking had occurred. *Devines I.*, 665 F.2d at 141–42. Subsequently, a second panel, in *Devines II.*, misapplied *Texaco* so as to effectively render the above-stated principles of regulatory takings law obsolete or irrelevant. *Devines II*, 728 F.2d at 881–886.

Texaco held that government can impose self-executing conditions on the retention of private property if the burden of satisfying the condition is so slight that it can safely be presumed that its non-performance constitutes a voluntary abandonment by the owner. If the misapplication of this holding of *Texaco* by the court below is given precedential value, *Kaiser Aetna* would be effectively nullified because the nature of the property interest lost would no longer be of constitutional importance in regulatory taking cases. Further, *Pennsylvania Coal Co.* would also be overruled, for all practical purposes, because the extent of the government's interference with that interest would cease to be of constitutional significance. Finally, a broad *ad hoc* factual inquiry into the investment-backed expectations of the property owner, as mandated by this Court in *Penn Central*, would be superfluous.

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balance, there was no taking. Nor could it have, on the record. As the Court of Appeals recognized *Devines II.*, 728 F.2d at 878, the district court found that the "temporary" orders to vacate were the practical equivalent of permanent orders to vacate buildings scheduled for demolition. 494 F.Supp. at 994. Once tenants are put to the expense and burden of leaving their homes and finding and moving to new ones, they do not move back, and cannot be expected to do so, even if repairs are made. *Id.* Thus, no significance can be accorded to the City's labeling the vacate orders "temporary" when in practice they are complete and permanent.

B. Texaco did not change the law of regulatory takings so as overrule Kaiser Aetna, Pennsylvania Coal Co., Penn Central and Devines I. The Court below simply misapplied Texaco.

1. The misapplication by the court below of Texaco *results in a ruling which directly conflicts with this Court's prior holdings on the extent to which the police power can define the existence of a constitutionally protected property interest.*

The court below, after first recognizing the City's enactment of its housing code as a valid exercise of its police power, defined petitioners' property to consist only of the right to occupy habitable premises. *Devines II*, 728 F.2d at 882–884 and 885–886. The *Devines II* panel reasoned that petitioners' losses result from the occurrence of physical conditions which make the premises uninhabitable and not from the City's determination that these conditions require that petitioners be summarily ordered to vacate their homes, as did the first panel in *Devines I*, 665 F.2d at 143–144.

Under this view, government can escape the just compensation requirement of the Fifth Amendment by enacting limitations on petitioners' property interest so as to legislate it out of existence. Yet, the decisions of this Court long ago established the principle that the taking question cannot be resolved against a property owner merely by concluding that a valid exercise of the police power has extinguished the property, thus eliminating the right that otherwise would have been taken. In the words of Justice Holmes, "obviously the implied [police power] limitation must have its limits or the contract and due process clauses are gone." *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 413.

Three times in the last five years this Court has reiterated the principle that there are limits upon government's power to avoid the restraints of the taking clause by narrowly defining property rights. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court specifically rejected a similar argument to the effect that, because the federal government had the power to regulate navigable waters, the right of an owner of a marina to exclude others was not an element of that owner's constitutionally pro-

tected property interest and was not protected by regulatory taking law *Id.*, at 178–180.

This Court again specifically rejected this argument in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). There, this Court denied Florida's claim that it had a right to the interest which had been earned by funds deposited in a court's registry. To the state's argument that there was no taking because the Florida law merely retained what it had created, the Court observed that the state cannot convert private property into public property merely by saying it is so. *Id.*, at 163–164.

This Court steadfastly maintained this position in a third case. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), it specifically rejected the argument that the apartment building owner had no property right affected by the government's actions because New York's landlord-tenant law had defined the property in dispute as the tenant's, not the landlord's. As the Court explained, "the government does not have unlimited power to redefine property rights" in order to avoid just compensation. *Id.*, at 439.

In ruling in petitioners' favor, the first panel, in *Devines I*, simply applied these still valid principles:

> Defendants' argument cannot be approved without obliterating the Fifth Amendment protection against regulatory takings that benefit the public at the expense of the individual. Every regulation of private property limits the use of that property by the owner and makes certain uses "illegal." It is the very fact that a regulation enacted for the public benefit may deny an individual a use of his property that he would otherwise enjoy that gives rise to the Fifth Amendment inquiry whether the regulation causes the individual to bear a burden that in fairness should be distributed among all those benefitted.
>
> The state may not severely limit or otherwise destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed.
>
> *Devines I.*, 665 F.2d at 143.

The *Devines II* panel misapplied *Texaco* and came into conflict with the foregoing cases when it equated the

occurrence of the physical conditions that constitute uninhabitability under the City's housing code with the self-executing statute of limitations type of condition at issue in *Texaco*. *Texaco*, 454 U.S. at 516. By doing so, unlike the first panel in *Devines I*, it failed to recognize that petitioners' right to continued occupancy, i.e. petitioners' protected property interest, went beyond this and existed until the code is so seriously violated that the property must be condemned. Unlike *Texaco*, this is a decision which is the total and complete prerogative of the City and not of petitioners. *Posnanski v. Hood*, 46 Wis. 2d 172, 174 N.W. 2d 528 (1970). Regardless of the opinion of a tenant,

> Unless and until such judgment was made and the appropriate procedural steps subsequently taken the plaintiffs' homes were legally inhabitable under the laws of the State and the City. *Devines I.*, 665 F.2d at 144.

No matter what the condition of a residential unit in Milwaukee in fact is, it is not uninhabitable until the City says it is. Unlike *Texaco*, no loss can occur until and unless a government official acts.

2. *By failing to make the* ad hoc *broad ranging factual inquiry required by all of this Court's prior rulings in this area, the court below misapplied* Texaco *and thereby came into conflict with those prior decisions of this Court which hold that no single person or group should bear the entire burden of providing a benefit for the whole.*

This court has demanded that, in each instance where the existence of a regulatory taking is the issue, an *ad hoc* broad ranging factual inquiry be made. *Penn Central*, *supra*. Its purpose is to determine if petitioners are being unfairly required to bear an unjust share of the cost of the government's actions on behalf of the public good. *Armstrong v. United States*, 364 U.S. 40 (1960).

The failure by the court below to comply with this oft-repeated instruction resulted in the misapplication of *Texaco*'s requirement that, to escape the reach of the Fifth Amendment's just compensation requirement, any condition a property owner must perform to retain property can only "impose a relatively slight burden on the owner while providing a clear benefit to the state." *Texaco*, p. 530. Further, only if the burden imposed on the owner is rela-

tively slight can the failure to discharge that burden be reasonably presumed to indicate a lack of "a present intention to retain the interest." *Texaco*, 454 U.S. at 526.

In this case, the burden the *Devines II* panel would have the petitioners bear is not a relatively slight one. Its ruling would have petitioner Devines, for example, bearing the cost of repairs of the building in which her unit was situated. Since she was ordered to vacate her unit pursuant to Section 66.05, Wis. Stats., the City had already determined that the cost of repairs would exceed 50% of the equalized value of the building once repaired.[9] Alternatively, Ms. Devines and her fellow petitioners bear the burden of being involuntarily and summarily displaced under threat of prosecution. Thus, the cost of enforcing the housing code in this fashion is almost entirely borne by petitioners who are the persons least able to afford that burden and are also the persons least likely to share in the benefits.

Finally, the failure by petitioners to effect such repairs, being so clearly beyond their financial means, cannot be considered evidence of a lack of a present intention to retain their homes and so provide a basis for holding that their loss resulted from a failure by them to do something they were able to do but simply neglected to do.

3. *The court below misapplied* Texaco *and, as a result, its ruling conflicts with this court's prior decisions requiring the payment of just compensation on the basis of what government does rather than its intent in, or fault for, acting as it did.*

In *Texaco*, this Court stated: "It is the owner's failure to make any use of the property and not the action of the State that causes the lapse of the property right; there is no "taking" that requires compensation." *Id.*, p. 530.

The Court below misapplied this holding by exempting the City from coverage by the Fifth Amendment

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9. This would involve more than repairs whose costs are minor in relation to the rent paid by her and other low-income households referred to by Section 704.07, Wis. Stats. Just as obviously, these repairs involve owners' long-term neglect and not misuse by present occupants, petitioners. See, p. 9, *supra*.

because the uninhabitable condition which required the City to order the petitioners from their homes was not the fault of the City but of the landlord and/or tenant,[10] *Devines II.*, 728 F.2d at 886.

This distortion of the holding in *Texaco* brings the ruling of the court below into conflict with this Court's prior decisions. Fault on the state's part has never been a pre-condition for establishing that a compensable taking has resulted from the exercise of government's regulatory power. A compensable taking depends solely on what the state does and not on its intent or what it says. *Devines I*, 665 F.2d at 142.

In any regulatory taking case, the state is by definition innocent because it is pursuing a valid public purpose, namely to protect the public interest against a threat arising from conditions that may or may not have been caused by the property owner or third parties. In *Loretto, supra*, there was nothing wrongful about the government's choice to promote cable TV. Nor was it any fault of the government that individuals decided to build their homes over coal bearing areas as the respondents did in *Pennsylvania Coal Co. v. Mahon, supra.* To read *Texaco* as establishing a doctrine that no taking of property can occur in the regulatory context unless the government is somehow "at fault" would be to undermine all this Court's decisions in the regulatory taking arena since *Pennsylvania Coal Co. v. Mahon, supra.*

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10. The Court of Appeals constantly utilized this phraseology, i.e., "landlord and/or tenant." *Devines II*, 665 F.2d at 882, n.5, 884, 886. The court was forced into considering the tenants' innocence irrelevant because, as has already been shown, there is nothing in the facts of this case nor can Wisconsin law be reasonably interpreted to conclude that it is the failure of petitioners to comply with their statutory obligation regarding maintenance of premises which results in structures becoming so uninhabitable that their property is lost. Nor have petitioners ever argued that, if it could be so demonstrated, they would be entitled to such compensation. Petitioners' failure to challenge that provision, in the order of the district court on remand, which contains this qualification on petitioners' right to compensation is evidence thereof. (App. 126–127). It should also be noted that the City had the power to act to prevent these buildings from reaching such a state of dilapidation. *See* note 4, *supra*.

Texaco did not involve an owner suffering a loss of property as the result of the failure by a third party to perform a government imposed condition for the owner's retention of property. And, while *Texaco* speaks of action by the state causing or not causing the loss, it does not hold that to be a compensable taking the loss suffered by the property owner must result from conditions caused by the fault of the state. As the panel in *Devines I* found, petitioners' loss was caused by the City's administrative decision without which no deprivation could occur, not by the mere existence of physical defects which constituted violations of the City's housing code. *Id.*, 665 F.2d at 144.

The Court below could cite no case other than *Texaco* in support of its overruling the prior panel's decision. *Texaco* was and is inapplicable for the reasons stated above. In relying on an inapplicable case, the court below distorted *Texaco*'s holding. This resulted in a decision which flies in the face of every regulatory taking case which descended from *Pennsylvania Coal Co.*

By insisting upon their right to just compensation, petitioners are not suggesting that housing code enforcement is *per se* invalid or even that it is unwise. *Devines II*, 728 F.2d at 883–884. Petitioners' position is merely that they alone should not pay the price of achieving the progress which code enforcement brings to the public as a whole. As the Court of Appeals explained in *Devines I*:

> . . . the City placed a disproportionately heavy burden on those individual members of the community who have little or no choice but to live in low cost, often substandard, housing. The fairness dictated by the Fifth Amendment requires that the economic burden borne by the plaintiffs for the benefit of the community be distributed among those benefited.

665 F.2d at 146. In contrast to this, *Devines II* creates a disquieting anomaly. The City punishes landlords for conduct inimical to the public good by depriving them of only a portion of their property; but, in the process, deprives petitioners, who have not acted against the public good, of their entire property. As a result the petitioners who are those in society who are least able to bear the cost are required to bear the entire cost of achieving this benefit which inures to benefit of the whole community.

CONCLUSION

In light of the foregoing, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully Submitted,

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June 29, 1984

APPENDIX

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APPENDIX A

Opinion by Judge Coffee
JUDGMENT—ORAL ARGUMENT
United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604
February 17, 1984
Before
Hon. JOHN L. COFFEY, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. William J. Campbell, Senior District Judge*

DELORES DEVINES, et al., Plaintiffs-Appellees,
Cross-Appellants, Nos. 83-1307, 83-1352 and 83-2587
vs.
HENRY W. MAIER, et al., Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 78-C-742
John W. Reynolds, Judge.

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this case appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

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*The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

Delores DEVINES, et al., Plaintiffs-Appellees, Cross-Appellants,

v.

Henry W. MAIER, et al., Defendants-Appellants, Cross-Appellees.

Nos. 83-1307, 83-1352 and 83-2587.

United States Court of Appeals, Seventh Circuit.

Argued Oct. 31, 1983.

Decided Feb. 17, 1984.*

Tenants who had been evicted from substandard housing by city sought compensation under the Fifth Amendment, state law, and the Uniform Relocation Act. The United States District Court for the Eastern District of Wisconsin, John W. Reynolds, Chief Judge, 494 F.Supp. 992, entered judgment in favor of city and tenants appealed. The Court of Appeals, 665 F.2d 138, affirmed in part, reversed in part and remanded. On remand, the United States District Court for the Eastern District of Wisconsin, John W. Reynolds, J., rendered judgment ordering city to compensate tenants with relocation benefits and awarded attorney fees to tenants. All parties appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) there was no constitutional "taking" where tenants were ordered to temporarily vacate their uninhabitable dwelling to permit repairs, pursuant to housing code, since state-created property right in form of possessory interest in leasehold was conditioned on

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* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of overruling *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981).

continued habitability of the leasehold, and the unhabitability occurred through no fault of the State, and (2) given reversal of decision for tenants, award of attorney fees would be remanded as well for consideration whether tenants were, in fact, prevailing parties under section 1988.

Reversed and remanded.

1. Eminent Domain — 2(1.1)

There was no constitutional "taking" where tenants were ordered to temporarily vacate their unhabitable dwelling to permit repairs, pursuant to housing code; state having created property right in form of possessory interest in leasehold was conditioned on continued habitability of the leasehold, and the uninhabitability occurred through no fault of the state. U.S.C.A. Const.Amends. 5, 14; W.S.A. 66.05, 66.05(1)(a), (2)(a, c), 62.17, 704.05(2), 704.07.

See publication Words and Phrases for other judicial constructions and definitions.

2. Federal Courts — 945

Where district court judgment in favor of tenants on issue of Fifth Amendment compensation for being ordered to temporarily vacate their uninhabitable dwelling to permit repairs was reversed on appeal, attorney fee award of $35,000 in favor of tenants as "prevailing parties" under section 1988 would be remanded to allow the district court to fully and adequately consider whether tenants were, in fact, prevailing parties. 42 U.S.C.A. § 1988.

Patrick B. McDonnell, Asst. City Atty., Milwaukee, Wis., for defendants-appellants, cross-appellees.

Louis J. Mestre, Legal Action of Wisconsin, Inc., Milwaukee, Wis., for plaintiffs-appellees, cross-appellants.

Before COFFEY and FLAUM, Circuit Judges, and CAMPBELL, Senior District Judge.**

** The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

COFFEY, Circuit Judge.

Appellants, cross-appellees, Henry W. Maier, et al., appeal the judgment of the United States District Court, Eastern District of Wisconsin ordering the City of Milwaukee to compensate Devines, et al., with relocation benefits. Cross-appellants, Devines, et al., appeal the district court's calculation of relocation benefits. We reverse the district court's January 21, 1983 judgment on the issue of compensation under the Fifth Amendment and Wis.Stat. § 32.-19, and remand this case on the limited issue of determining if attorney's fees are warranted under 42 U.S.C. § 1988 (Supp. IV 1980).

I.

The material facts of this case were initially set forth by the District Court in *Devines v. Maier*, 494 F.Supp. 992 (E.D. Wis. 1980). The case was appealed, and this court, in reversing and remanding the district court's decision, again set forth the material facts in *Devines v. Maier*, 665 F.2d 138 (7th Cir.1981)("*Devines I*"). Thus, for purposes of this appeal, arising out of the district court's judgment on remand, we will summarily review only those material facts pertinent to the present decision.

In 1975, the City of Milwaukee applied for and received a Community Development Block Grant from the United States Department of Housing and Urban Development ("HUD"). As the district court noted in its original opinion of August 9, 1980, "[t]he block grant program is a method of distributing federal housing and community development funds to the nation's cities in a manner which allows the participating cities to determine, within certain statutory guidelines, precisely how those funds will be spent." *Devines v. Maier*, 494 F.Supp. at 993. Between 1975 and 1978, the types of local housing and community development programs eligible for funding under the Community Development Block Grant included programs to improve housing code enforcement in deteriorating neighborhoods, *see* 42 U.S.C. § 5305(3) (1976), and programs to provide persons displaced by activities funded through the block grant program with relocation payments and assis-

tance, *see* 42 U.S.C. § 5305(11) (1976). In 1975, Milwaukee received approximately $13,383,000 in Community Development Block Grant funds, and allocated $104,500 to the Intensive Code Enforcement Program ("ICEP") and $206,400 to the Code Enforcement Relocation Program ("CERP"). Pursuant to 42 U.S.C. § 5305, the ICEP was designed to improve housing code enforcement in certain deteriorating areas of Milwaukee and the CERP was designed to provide relocation benefits to tenants of dwellings that the City ordered razed and removed under Wisconsin law.

Following 1975, the City continued to receive yearly block grant funds which were appropriated, in part, to the ICEP and the CERP.[1] The funds allocated to the CERP were never "fully utilized" and the excess memory was " 'reprogrammed' into other block grant programs which came up short of funds in a given year." *Id.* at 994. According to the district court's original opinion of August 9, 1980, the surplus in CERP funds resulted from the City's restrictive eligibility requirements. *Id.* A CERP Policy Statement issued by the City revealed that a recipient of CERP funds had to:

> "(1) reside within the geographic area designated in the City's block grant application (a low income area which is practically coterminous with the ICEP target area); (2) be a 'family' or an 'individual' which is in lawful occupancy of a rented dwelling; and (3) *be served with a 'notice to vacate' because the building has been ordered razed and removed pursuant to Wisconsin law.*" (emphasis added).

Id. According to these eligibility requirements only tenants lawfully residing in a designated geographic block, whose dwelling was "ordered razed and removed pursuant to

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1. The district court found, in its original opinion of August 9, 1980, that:

> "The City has continued to receive yearly block grant funding from HUD. The ICEP and the CERP programs have continued to receive appropriations from the yearly grants. The amounts allocated to ICEP have increased almost yearly since the initial 1975 grant, and now stand at $400,000 a year. The CERP funding, however, was decreased to $170,000 in 1976, and to $50,000 a year thereafter."

Devines v. Maier, 494 F.Supp. at 994.

Wisconsin law," qualified for CERP benefits. Thus, tenants ordered by the City to *temporarily* vacate a dwelling in violation of the housing code and determined by the City to be in need of repair were not eligible for CERP benefits. In addition, the district court found, in its original opinion of August 9, 1980, that "for all practical purposes, tenants forced to relocate due to what the City term[ed] 'temporary' code violations [were] put to the same trouble and expense as tenants who [were] forced to vacate a building which [was] scheduled to be razed." *Id.*

Appellee Devines represents a class of tenants who were ordered to *temporarily* vacate their dwelling under Milwaukee's ICEP but failed to qualify for CERP benefits. In 1979 appellees brought a class action against the City of Milwaukee; and its mayor, Henry W. Maier, in the United States District Court for the Eastern District of Wisconsin, alleging that the City failed to provide class members with financial compensation upon their being displaced pursuant to the ICEP. The class members claimed, *inter alia*, that the City's actions violated the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. § 4601, *et seq.* (1976) ("Uniform Relocation Act"), the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* (1976) ("Community Development Act"), the Just Compensation Clause of the Fifth Amendment, and Wis.Stat. § 32.19.[2]

Plaintiffs and defendants filed motions for summary judgment and on August 9, 1980, the district court granted defendants' motion for summary judgment. *See Devines v. Maier*, 494 F.Supp. 992 (E.D.Wis. 1980). The district court, in its original decision, ruled that government regulations designed to promote public health and safety, such as the City of Milwaukee's housing code enforcement, were not "takings" within the meaning of the

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2. The class members also alleged that the City's failure to provide them with an administrative hearing to challenge the denial of relocation benefits violated the Due Process Clause of the Fourteenth Amendment and Wis. Stat. § 68. In addition, plaintiff Devines claimed, individually, that the City's actions violated the Equal Protection Clause of the Fourteenth Amendment, HUD regulations contained in 42 C.F.R. § 570.602(d), and the

Fifth Amendment, and thus the plaintiffs were not entitled to compensation under the Fifth Amendment or Wis.Stat. § 32.19. *Id.* at 995. The court further ruled that because the City of Milwaukee was not "acquir[ing] the building's use," the plaintiffs failed to qualify as "displaced persons" under the Uniform Relocation Act and, therefore, were not entitled to compensation under the Act. *Id.* at 996. The court finally ruled that the City's ICEP and CERP "primarily benefit[ted] low and moderate income persons," thereby complying with the federal block grant regulations and precluding the plaintiffs from receiving relocation benefits under the Community Development Act. *Id.* at 997. Plaintiffs appealed the district court's judgment on the issue of compensation under the Fifth Amendment, Wis.Stat. § 32.19, and the Uniform Relocation Act.

On November 23, 1981, this court affirmed the district court's denial of relocation benefits under the Uniform Relocation Act, holding that the City's order to temporarily

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City's CERP eligibility statement. Plaintiff Devines also claimed money damages suffered as a result of the City's failure to provide her with appropriate benefits.

According to the plaintiff's complaint, on January 26, 1978, the City of Milwaukee ordered that the building in which Devines' resided be razed and removed. The Milwaukee County Circuit Court issued a temporary restraining order preventing the razing of the building but on February 18, 1978, Devines moved from those premises. On May 3, 1978, a final injunction was entered in the Milwaukee County Circuit Court enjoining the City from razing the building but authorizing enforcement of the building code violations. Devines, et al., filed suit in district court and on October 2, 1979, the district court approved a stipulation whereby the City agreed to pay CERP benefits to Devines, individually, and to all other tenants of the building who vacated their premises before the City's January 26, 1978 order was enjoined in Milwaukee County Circuit Court. Thus, pursuant to Fed.R.Civ.P. 41, the court dismissed Devines' individual claims. On October 5, 1979, the court approved another stipulation in which the City agreed to provide all tenants ordered to vacate their dwelling with notice of their right to apply for relocation benefits and their right to an administrative hearing in the event that relocation benefits were denied. Thus, pursuant to Fed.R.Civ.P. 41, the court dismissed plaintiffs' claims under the Due Process Clause of the Fourteenth Amendment and Wis. Stat. § 68.

vacate uninhabitable dwellings "did not constitute an acquisition under 42 U.S.C. § 4601(6), and that the plaintiffs were not 'displaced persons,'" entitled to benefits under the Act. *Devines I*, 665 F.2d at 148. The court, however, reversed and remanded on the issue of just compensation under the Fifth Amendment and Wis.Stat. § 32.19. In the majority opinion, this court held that the City's determination that a dwelling was uninhabitable constituted a regulatory taking of plaintiff's leasehold rights for a public purpose, and thus entitled plaintiffs to just compensation under the Fifth Amendment and Wis.Stat. § 32.19. The court remanded for a determination of what compensation would be just under the Fifth Amendment and Wis.Stat. § 32.19. In a concurring opinion, Judge Fairchild agreed with the reasoning of the majority but noted that, "[T]here is a taking only insofar as there was room for the exercise of discretion. Where the evidence of uninhabitability is so overwhelming that no reasonable person could conclude to the contrary the mere adjudication of that status by the state does not require compensation."[3] *Id.* at 148 (Fairchild, J., concurring.

On remand the district court, pursuant to the court's mandate in *Devines I*, entered summary judgment for the plaintiffs and ordered the City of Milwaukee to compensate the plaintiffs with a relocation rent differential payment, actual moving expenses, and actual moving related expenses. On July 26, 1983, the district court awarded the plaintiffs $35,000 in attorney's fees as the "prevailing party" under 42 U.S.C. § 1988. On appeal, Mayor Henry W. Maier, et al., request this court to:

A. Review the decision in *Devines I* on the issue of just compensation under the Fifth Amendment in light of the United States Supreme Court's holding in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) and the Court's dicta in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

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3. Judge Fairchild added that the issue of whether a dwelling is "so uninhabitable that no reasonable person could find otherwise . . . is an issue of fact that had to be left for determination by the factfinder." *Devines I*, 665 F.2d at 148 (Fairchild, J., concurring).

On cross appeal, Devines, et al., contend that:

B. Wis.Stat. § 32.19 is the standard to be followed in calculating plaintiff's compensation.

We shall deal with these issues individually.

II.

A. *DEVINES I*

[1] In *Devines I* this court ruled that the City of Milwaukee's order to temporarily vacate unihabitable dwellings constituted a public taking within the meaning of the Fifth Amendment, and entitled the class of affected plaintiffs to just compensation. On appeal, Henry W. Maier, et al., urge this court to reconsider its ruling in light of the United States Supreme Court's recent holding in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) ("*Texaco*") and the Court's recent dicta in *Loretto v. Teleprompter Manhattan CATV Corp.*, 484 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) ("*Loretto*"). Before addressing the appellants' claim, this court must initially determine the effect to be given our prior disposition of the Fifth Amendment issue in *Devines I*.

This court has "long held that 'matters decided on appeal become the law of the case to be followed . . . on second appeal, in the appellate court, unless there is plain error of law in the original decision.'" *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 607 (7th Cir.1980), *cert. denied*, 451 U.S. 976, 101 S.Ct. 2058, 68 L.Ed.2d 357 (1981) (quoting *Kaku Nagano v. Brownell*, 212 F.2d 262, 263 (7th Cir. 1954)) ("*Appleton*"). *See also Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982). In *Appleton*, this court explained that the "law of the case" doctrine does not limit a court's power to reconsider its prior ruling, but is:

> "based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members,' and that it would be impossible for an appellate court 'to perform its duties satisfactorily and efficiently' and expeditiously 'if a question, once considered and

> decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof."

635 F.2d at 607–08 (quoting *White v. Murtha*, 377 F.2d 428, 431 (5th Cir.1967)). *See also Gertz v. Robert Welch, Inc.*, 680 F.2d at 532. The "law of the case" doctrine, however, is not an immutable concept, "and should not be applied where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case." *United States v. Habig*, 474 F.2d 57, 60 (7th Cir.) *cert. denied* 411 U.S. 972, 93 S.Ct. 2145, 36 L.Ed.2d 695 (1973) (quoting *Luminous Unit Co. v. Freeman-Sweet, Co.*, 3 F.2d 577, 580 (7th Cir.1924)). Accordingly, this court has, on a limited number of occasions, reconsidered a previous adjudication and has concluded that our former ruling was clearly erroneous. *See, e.g., Appleton*, 635 F.2d at 608; *United States v. Habig*, 474 F.2d at 60.

The decision of this court in *Devines I* was written prior to the United States Supreme Court's holding in *Texaco* and its dicta in *Loretto* on the issue of whether a state's regulatory action constitutes a taking of private property for public use within the meaning of the Fifth Amendment. In order to properly analyze the issue of whether the City of Milwaukee's enforcement of its housing code, whereby tenants are ordered to temporarily vacate uninhabitable dwellings, constitutes a public taking within the meaning of the Fifth Amendment, we find it necessary to reconsider this court's holding in *Devines I*, in light of *Texaco* and *Loretto*. Our decision to reconsider the holding in *Devines I* is further buttressed by the concurring opinion in *Devines I* that "[w]here the evidence of uninhabitability is so overwhelming that no reasonable person could conclude to the contrary the mere adjudication of that status by the state does not require compensation." 665 F.2d at 148 (Fairchild, J., concurring). This statement reveals an apparent unclarity in *Devines I* with regard to when, if ever, an order to temporarily vacate an uninhabitable dwelling constitutes a public taking within the meaning of the Fifth Amendment, thereby entitling the

affected tenants to just compensation. The United States Supreme Court's language in *Texaco* and *Loretto* resolves the apparent unclarity of *Devines I*.

The fifth amendment, made applicable to the states by the Fourteenth Amendment, provides, "[N]or shall private property be taken for public use, without just compensation." In *Devines I*, this court properly determined that leasehold interests are property interests protected by the Fifth Amendment. 665 F2d at 141. *See, e.g., Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303, 96 S.Ct. 910, 916, 47 L.Ed.2d 1 (1976); *United States v. Petty Motor Co.*, 327 U.S. 372, 378, 66 S.Ct. 596, 600, 90 L.Ed. 729 (1946). We noted that, "[t]o a great extent, whether or not a regulation of private property rights for a public purpose constitutes a taking depends upon the extent of interference with the private right. When the 'regulation goes too far, it will be recognized as a taking.'" 665 F.2d at 141 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922)). *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174–75, 100 S.Ct. 383, 389–90, 62 L.Ed.2d 332 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123–28, 98 S.Ct. 2646, 2659–61, 57 L.Ed.2d 631 (1978); *Matter of Gifford*, 688 F.2d 447, 455–56 (7th Cir.1982).

In *Devines I*, the City of Milwaukee argued that "because state law made continued occupancy of [uninhabitable] buildings illegal, the plaintiffs had no legitimate rights to occupy the structures and thus . . . the orders to vacate did not interfere with any legal property interests of the plaintiffs." 665 F.2d at 143. This court rejected the City's argument based upon the fact that "the determination that a building is uninhabitable requires an administrative determination that involves the discretion of the building inspector," *id.* at 144, and thus the plaintiffs had a legal right to occupy their rental dwellings until those rights were terminated by the City's enforcement of its housing code. This court concluded that the plaintiffs'

"rights were so completely destroyed by the City's action that a regulatory taking of plaintiffs' rights occurred," *id.*, and that such taking was "in order to promote public interest in safety, health, morals, and the general welfare." *Id.* at 146. Accordingly, the court held "that the plaintiffs [were] entitled by the Fifth Amendment to just compensation for the regulatory taking of their leasehold rights for a public purpose . . . ." *Id.*

Since that decision in November 1981, the United States Supreme Court has in two other cases further clarified the issue of regulatory takings under the Fifth Amendment. In *Texaco* the Court considered the constitutionality of an Indiana statute, the Dormant Mineral Interests Act, Ind.Code § 32–5–11–1 *et seq.* (1976) ("Mineral Lapse Act"), which provided that "a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office." 454 U.S. at 518, 102 S.Ct. at 786. The "use" of a mineral interest, sufficient to preclude its extinction, included "the actual or attempted production of minerals, the payment of rents or royalties, and any payment of taxes." *Id.* at 519, 102 S.Ct. at 786.[4] The Court initially ruled that the State of Indiana had the power to enact the Mineral Lapse Act because,

> "just as a State may create a property interest that is entitled to constitutional protection, *the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.*" (emphasis added).

Id. at 526, 102 S.Ct. at 790. In response to the plaintiffs' claim that the Mineral Lapse Act "takes private property without just compensation," the Court ruled:

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4. The Supreme Court noted that an exception to the general lapse rule existed, "if an owner of 10 or more interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving actual notice of the lapse." *Texaco*, 454 U.S. at 519–20, 102 S.Ct. at 786–87.

> "In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, *this Court has never required the State to compensate the owner for the consequences of his own neglect.* We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. *It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a statement of claim is not itself a 'taking'.*" (emphasis added).

Id. at 530, 102 S.Ct. at 792. In sum, the Court in *Texaco* clearly provides that a State can place reasonable conditions on a property right that it creates, and that no Fifth Amendment "taking" occurs when an owner's failure to make any use of the property causes the lapse of a property right.

The Court's language in *Texaco* is directly applicable to the facts in this instance where the State of Wisconsin creates a property right, in the form of a possessory interest in the leasehold, and conditions that property right on the continued habitability of the leasehold.[5] Pursuant to Wis.Stat. § 704.05(2) (1981), the State of Wisconsin confers upon tenants "the right to exclusive possession of the premises" for the term of their lease. The

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5. The facts in the instant case are more in line with those in *Texaco* than with those in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) ("*San Diego*"), a case upon which the court in *Devines I* placed significant reliance. In *San Diego*, the plaintiff acquired land in 1966 as a possible site for a nuclear power plant to be constructed in the 1980's. At the time of purchase, "most of the land was either zoned for industrial use or in an agricultural 'holding' category." 450 U.S. at 624, 101 S.Ct. at 1289. In 1973, the land was placed among the City of San Diego's "open-space areas," and it was proposed that the property be preserved as parkland. The plaintiff filed suit alleging that the City had taken its property without just compensation in violation of the Fifth Amendment. The majority

State then conditions this right on the reasonable condition that the premises remain fit for human habitation. Wis.Stat. § 66.05(1)(a) (1981) provides that a municipality, such as the City of Milwaukee:

> "may order the owner of the premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary . . . ."

See also, sections 12–3(4), (5), Milwaukee Code of Ordinances (1981). Wis.Stat. § 66.-05(2)(a) further provides that if a municipality declares a building unfit for human habitation and repair of the building is feasible, then the building inspector shall post a placard on the premises that reads "This Building Cannot Be Used For Human Habitation, Occupancy, or Use." *See also* section 12–3(6) Milwaukee Code of Ordinances (1981). Finally, Wis.Stat. § 66.05(2)(c) provides that any person who rents, leases, or occupies a building that has been condemned for human habitation is subject to a fine not less than $5.00 or more

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opinion held that the California Court of Appeal decision was not final and thus the United States Supreme Court was without jurisdiction to review the case. Justice Brennan dissented, and expressing the view of at least five members of the Court as to the merits, claimed that the City's actions did constitute a public taking within the meaning of the Fifth Amendment. It must be noted, however, that in *San Diego*, the Court never reached the issue of whether the City's rezoning laws constituted a public taking within the meaning of the Fifth Amendment. Furthermore, the facts in *San Diego* and all similar zoning ordinance cases arising under the Just Compensation Clause of the Fifth Amendment are markedly distinct from the facts in this instance. In *San Diego*, it was not the activity or inactivity of the plaintiff utility company that caused the City to rezone certain property, rather the City was merely exercising its power to regulate land use. In the instant case, however, it is the failure of the landlords and/or tenants to maintain their premises in a condition fit for human habitation that causes the premises to become uninhabitable and declared so by the City. See, *e.g.*, Wis.Stat. § 704.07.

than $50.00 or imprisoned not more than 30 days for each week of such violation.[6] According to Wis.Stat. § 704.05(2) the State of Wisconsin creates a property right in the form of "exclusive possession of the premises" but pursuant to the housing code provisions, embodied in Wis.Stat. § 66.05 and section 12–3 Milwaukee Code of Ordinances, the State of Wisconsin and the City of Milwaukee condition that interest on the reasonable condition that the premises remain fit for human habitation during the tenant's period of exclusive possession.

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6. The City of Milwaukee's housing code, presently embodied in section 12–3, Milwaukee Code of Ordinances, is substantially similar to the State of Wisconsin's housing code, embodied in Wis.Stat. § 66.05. Section 12–3 of the Milwaukee Code of Ordinances was enacted pursuant to Wis.Stat. § 62.17, and, at the time in question, was embodied in sections 12–4 and 51–14 of the Milwaukee Code in Ordinances: *See Devines I*, 665 F.2d at 143.

Section 12–3 of the Milwaukee Code of Ordinances provides:

"(4) UNSAFE BUILDINGS, STRUCTURES, OR EQUIPMENT.

Whenever the Commissioner of Building Inspection shall find any building, structure, or equipment, or any part thereof, in an unsafe condition because of the insufficiency of stairs, exits, or structural strength thereof, or in danger from fire, due to defects in construction, or because of deterioration, removal of any appliance, device, or equipment required by this code, or because of the hazardous manner in which it is used, or because of any other defects endangering life, limb, or property, or because of illegal occupancy or use of any building or structure, he shall serve a written order on the owner of the premises and the persons occupying or using any such building, structure, equipment or premises to discontinue such occupancy or use at once, or as ordered, and thereafter until such defects have been corrected in accordance with the regulations of this code.

(5) DWELLING UNITS CONDEMNED AS UNFIT FOR HUMAN HABITATION.

(a) The Commissioner of Building Inspection shall condemn as unfit for human habitation any dwelling or dwelling unit wherein he finds any of the following defects:

1. One which is so damaged, decayed, dilapidated, insanitary, difficult to heat, unsafe, or vermin infested, that it creates a hazard to the safety or welfare of the occupants or the public; or

This court has already determined that the housing codes for the State of Wisconsin and the City of Milwaukee are a valid exercise of the police power, enacted in order to promote the public interest in safety, health, morals, and general welfare. *Devines I*, 665 F.2d at 145–46.[7] The plaintiffs do not contest the constitutionality of the housing codes or their underlying policy to "reduc[e] the

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2. One which lacks illumination, ventilation, or sanitary facilities adequate to protect the safety or welfare of the occupants or the public; or

3. One which, because of its general condition or location is insanitary or otherwise dangerous to the safety or welfare of the occupants or of the public.

(b) Any dwelling or dwelling unit may be condemned as unfit for human habitation by the Commissioner of Building Inspection if the owner or occupant failed to comply with any order based on the provisions of this code or any rules or regulations adopted pursuant thereto provided that such dwelling or dwelling unit is, in the opinion of the Commissioner, unfit for human habitation by reason of such failure to comply.

(6) PLACARDING OF BUILDINGS, STRUCTURES, OR EQUIPMENT.

(a) In all cases regulated in Section 12–2(2), (3), (4), and (5), the Commissioner of Building Inspection shall post at each entrance to such building, structure, or equipment, a notice to the effect that said building, structure, or equipment, is unsafe or unfit for human habitation and has been condemned; or that this building or structure is illegally occupied or used and shall be vacated at once as ordered.

(b) Such notice shall remain posted until the required repairs or alterations are made and it shall be unlawful for any person to remove such notice without written permission from the Commissioner of Building Inspection and it shall further be unlawful for any person to occupy or use or enter such building or structure thereafter, except for the purpose of making the required repairs or alterations."

7. As this court noted in *Devines I*, "The Statement of Purpose of the City of Milwaukee's housing code was originally codified at section 75–2 of the Milwaukee Code of Ordinances and subsequently was repealed and codified throughout the present chapter 51 of the Milwaukee Code of Ordinances." 665 F.2d at 145 n. 3.

In that statement the City declared that enactment of the housing code was essential to the public interests because:

"Part 2. It is hereby found and declared that premises exist within the City of Milwaukee which are blighted because there

incidence of substandard urban housing." *Id.* at 146. Thus, the State of Wisconsin, just as the State of Indiana in *Texaco*, has created a property right entitled to constitutional protection, (i.e., a possessory interest in a leasehold) but conditions the retention of that right on a reasonable condition (i.e., inhabitability of the leasehold).

In further comparison of the facts in the instant case to those in *Texaco*, the uninhabitability of the leasehold interest, just as the lapse of a mineral interest in *Texaco*, occurs through no fault of the State. Pursuant to Wis.Stat. § 704.07, in the absence of an agreement to the contrary, the tenant has the duty to repair any damage caused by his negligence or improper use and to keep plumbing, electrical wiring, machinery, and equipment furnished with

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> exists thereon blighted buildings, or other structures, either occupied or unoccupied by human beings, and such buildings or other structures are blighted because faulty design or construction, or failure to keep them in a proper state of repair, or lack of proper sanitary facilities, or lack of adequate lighting or ventilation, or inability to properly heat, or improper management, or any combination of these factors has resulted in such buildings or structures becoming so deteriorated, so dilapidated, so neglected, so overcrowded with occupants, or so unsanitary as to jeopardize or be detrimental to the health, safety, morals, or welfare of the people of the city. It is hereby further found and declared that such blighted premises and such blighted buildings or other structures contribute to the development of, or increase in, disease, infant mortality, crime and juvenile delinquency; that conditions existing on such blighted premises are dangerous to the public health, safety, morals, and general welfare of the people, that conditions existing on such blighted premises necessitate excessive and disproportionate expenditure of crime prevention, fire protection, and other public services; that the conditions existing on blighted premises cause a drain upon public revenue and impair the efficient and economical exercise of governmental functions in such areas. It is hereby further found and declared that the elimination of blighted premises and the prevention of occurrence of blighted premises in the future is in the best interests of the citizens of this city, of the State of Wisconsin, and the entire United States; and that the accomplishment of this end will be fostered and encouraged by the enactment and enforcement of this ordinance."
>
> *Id.* at 145–46.

the premises in reasonable working order if the cost of repairs are minor in relation to the rent. Unless the repair was made necessary by the negligence or improper use of the tenant, the landlord has the duty to keep the premises, and all equipment under his control, in a reasonable state of repair (i.e., fit for human habitation) and to make all necessary structural repairs. *See also* section 12–15 Milwaukee Code of Ordinances (1981).[8] Thus the uninhabitability of the leasehold interest is caused by the inattention of the landlord, as owner of the premises and/or the inattention of the tenant, as owner of a possessory interest in the premises. The United States Supreme Court in *Texaco*, presented with a similar fact pattern of owner inattention, stated that it is "the owner's failure to make any use of the property—and not the action of the State — that causes the lapse of the property right; *and there is no 'taking' that requires compensation.*" (emphasis added) 454 U.S. at 530, 102 S.Ct. at 792.

Plaintiffs attempt to distinguish the facts in the instant case from those in *Texaco* on the ground that the Mineral Lapse Act in *Texaco* was self-executing, *see id.* at 533, 102

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8. Section 12–15, Milwaukee Code of Ordinances uses language identical to that of Wis.Stat. § 704.07. In addition, section 51–81, Milwaukee Code of Ordinances, promulgated pursuant to Wis.Stat. § 62–17, further provides:

"51–81. Sanitary conditions.

(1) CLEANLINESS.

(a) Occupant's responsibility.

Every occupant of a dwelling or dwelling unit shall keep in a clean and sanitary condition that part of the dwelling, dwelling unit premises thereof which he occupies or controls, and prior to moving, vacating, or relinquishing occupancy or control. Every occupant of a dwelling or dwelling unit shall properly dispose of all garbage and rubbish, in accordance with the requirements of this code.

(b) Owner's responsibility.

Every owner of a dwelling containing two (2) or more dwelling units and every owner of a premises where two (2) or more dwelling units share the same premises shall be responsible for maintaining in a clean and sanitary condition all communal, shared, or public areas of the dwelling and premises thereof which are used or shared by the occupants of two (2) or more dwelling units."

S.Ct. at 794, whereas the Milwaukee housing code requires a building inspector to make a discretionary determination that a building is uninhabitable. Plaintiffs correctly note that in *Devines I* this court determined that the building inspector had to make a discretionary determination that a dwelling was uninhabitable, and thus the Mllwaukee housing code was not a self-executing statute. 665 F.2d at 144. For purposes of this appeal, we fail to see how the subtle distinction between the automatic lapse of mineral property in *Texaco* and the discretionary determination of uninhabitability in the instant case, is of any consequence. By declaring a dwelling uninhabitable, and issuing an order to temporarily vacate, the City of Milwaukee is simply performing its regulatory duty to protect the health, safety, morals, and general welfare of the public. The City's determination of uninhabitability is by no means final and binding upon tenants, rather it is an administrative determination that initiates a hearing process, including an appeal before the Building Maintenance Code Enforcement and Appeals Board, and eventually through the state court system. *See* sections 12–11(3), (5), Milwaukee Code of Ordinances (at the time in question, embodied in section 51–3(3), Milwaukee Code of Ordinances). In addition, Wis.Stats. § 66.05(3) provides that "anyone affected" by the City's order to vacate a dwelling, may apply for a restraining order in circuit court, and thereby allow the court, within twenty days, to determine the reasonableness of the City's order.

The Milwaukee housing code, therefore, allows tenants ordered by the City to temporarily vacate their dwelling, to have the order reviewed by the Building Maintenance Code Enforcement and Appeals Board and the state court system. This procedure of judicial review is similar to that in *Texaco* where the owner of lapsed mineral property was entitled to "a subsequent judicial determination that a particular lapse did occur." 454 U.S. at 535, 102 St.Ct. at 795.[9]

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9. The United States Supreme Court, in discussing the notice to which affected mineral owners were entitled under the Mineral Lapse Act, stated:

> *"It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that*

Though Milwaukee's housing code, by allowing the building inspector to make a discretionary determination that a dwelling is uninhabitable, differs from the Mineral Lapse Act in *Texaco*, where mineral property automatically lapses upon twenty years of non-use, both determinations are subject to judicial review. In *Texaco* the owner of mineral property, whose property interest has lapsed, is entitled to a judicial determination that the property interest has, in fact, reverted to the surface owner. In the instant case, the tenant ordered to temporarily vacate an uninhabitable dwelling is entitled not only to a hearing before the Building Maintenance Code Enforcement and Appeals Board but also to a judicial determination that the City's order to temporarily vacate is valid. Thus, the City of Milwaukee's initial determination of uninhabitability and the State of Indiana's statutory lapse of a mineral interest are neither final nor binding upon the affected parties and, in effect, serve as nothing more than a starting point for a hearing process that culminates in a full judicial inquiry into the matter. Furthermore, the Mineral Lapse Act conditions ownership of mineral property upon the condition that the mineral property be "used" and the Milwaukee housing code conditions possession of the leasehold interest upon the condition that the leasehold remain fit for human habitation. In the final analysis, both statutes place a reasonable condition upon a property right created by the state and allow anyone affected by the failure of that condition to contest the validity of the failure in court.

Based upon the foregoing analysis, we conclude that the United States Supreme Court's holding in *Texaco*, that no taking occurs when, pursuant to a state regulation, a mineral interest lapses, is dispositive of the result in this instance. The State of Wisconsin has created a property interest for tenants (i.e., a possessory interest in the lease-

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a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause—including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard—must be provided." (emphasis added).

Texaco, 454 U.S. at 534, 102 S.Ct. at 794.

hold) which it conditions on the reasonable requirement that the leasehold remain fit for human habitation. The uninhabitability of the premises occurs through no fault of the state but rather through the inattention of the landlord and/or tenant. We conclude that, in furtherance of its duty to protect the health, safety, morals, and general welfare of the public, and in light of the United States Supreme Court's holding in *Texaco*, the City of Milwaukee's order to temporarily vacate an uninhabitable dwelling cannot legally or logically be construed to constitute a taking within the meaning of the Fifth Amendment.

Our determination is further supported by the United States Supreme Court's language in *Loretto*, where the Court held that the permanent affixation of a cable T.V. transformer box and wires to the exterior of a residential rental building constituted a "taking" of the owners' property. In so holding the Court stated:

> "Finally, we do not agree with the appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. *This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation to all economic injuries that such regulation entails. . . . Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes. . . .*" (citations omitted) (emphasis added).

458 U.S. at 440, 102 S.Ct. at 798. Accordingly, we hold that in light of *Texaco* and *Loretto* this court's determination in *Devines I*, that the City of Milwaukee's order to vacate an uninhabitable dwelling constituted a public taking within the meaning of the Fifth Amendment was "clearly erroneous" as it was "contrary to the best interests of society and work[ed] a manifest injustice in the particular case." *United States v. Habig*, 474 F.2d at 60. By declaring a dwelling uninhabitable and issuing an order to temporarily vacate, the City of Milwaukee is performing its regulatory duty to protect the health, safety, morals, and general welfare of the public. Considering "the character of the action and . . . the nature and extent of the interfer-

ence with rights," *Penn Central Transportation Co. v. New York City*, 438 U.S. at 130–31, 98 S.Ct. at 2662–63 it is a manifest injustice and contrary to the best interests of society to penalize the City of Milwaukee for properly enforcing its building code, designed in part, to reduce the incidence of substandard housing. Upon reconsideration of our decision in *Devines I*, we hold that the City of Milwaukee's order to temporarily vacate an uninhabitable dwelling does not constitute a public taking within the meaning of the Fifth Amendment. Accordingly, we reverse the holding in *Devines I* that Devines, et al., are entitled to compensation under the Fifth Amendment and reinstate the district court's original finding that the City of Milwaukee's enforcement of its housing code does not entitle Devines, et al., to compensation under the Fifth Amendment.[10]

B. WIS.STAT. § 32.19

This court stated in *Devines I* that Wis.Stat. § 32.19 "merely implements the just compensation requirement . . . [and thus] our conclusion regarding the plaintiffs' Fifth Amendment claim is dispositive of the issue whether plaintiffs are entitled to compensation under Wis.Stat. § 32.19." 665 F.2d at 146. *See also Devines v. Maier*, 494 F.Supp. at 995. In light of our holding that the City of Milwaukee's order to temporarily vacate an uninhabitable dwelling does not constitute a public taking within the meaning of the Fifth Amendment, we do not reach the issue of compensation under Wis.Stat. § 32.19. Furthermore, we reverse the holding in *Devines I* that Devines, et al., are entitled to compensation under Wis.Stat. § 32.19 and reinstate the district court's original finding that Wis.Stat. § 32.19 "is not applicable in these circumstances." *Devines v. Maier*, 494 F.Supp. at 995.

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10. This court reverses the holding in *Devines I* only on the issue that the City of Milwaukee's enforcement of its housing code was a regulatory taking of Devines, et al., leasehold rights for a public purpose, thereby entitling the class of plaintiffs to just compensation under the Fifth Amendment and Wis.Stat. § 32.19. Our decision in no way affects the holding in *Devines I* that Devines, et al., do not qualify for relocation benefits under the Uniform Relocation Act.

[2] Finally, we note that following this court's mandate in *Devines I*, the district court, on July 23, 1983, awarded plaintiffs $35,000 in attorney's fees as "the prevailing party" under 42 U.S.C. § 1988. Though the issue of attorney's fees was preserved for appeal by the City of Milwaukee, the City gave only cursory treatment to the issue in its brief. Devines, et al., did not brief the issue of attorney's fees and neither party addressed the issue in its oral argument before this court. Accordingly, we remand this case to allow the district court to fully and adequately consider whether appellees, Devines, et al., were, in fact, a "prevailing party" in light of this court's decision.

III.

Based upon the United States Supreme Court's intervening decisions in *Texaco, Inc. v. Short*, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), we reverse the district court's January 21, 1983 judgment on the issue of compensation under the Fifth Amendment and Wis.Stat. § 32.19 and hold that the City of Milwaukee's order to temporarily vacate an uninhabitable dwelling does not constitute a taking within the meaning of the Fifth Amendment. We remand this case to the district court on the limited issue of determining if attorney's fees are warranted under 42 U.S.C. § 1988.

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APPENDIX B

United States District Court
Eastern District of Wisconsin

DELORES DEVINES, et al., Plaintiffs,
v.
HENRY W. MAIER, et al., Defendants.

ORDER
C.A. No. 78-C-742

This order implements the mandate of the Court of Appeals for the Seventh Circuit which is reported at 665 F.2d 138. After hearing the parties views in open court I requested that they submit proposed orders carrying out the mandate.

IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment and declaratory and injunctive relief on their claims for financial compensation and other benefits under Wis. Stat. § 32.19 and the Fifth Amendment is granted. Payment pursuant to Section 32.19(3)(a) and (b) and (4)(b) shall be made by the defendants to the named plaintiffs and to all persons who have been required, since November 20, 1978, to vacate their rented residences as a result of the City of Milwaukee's enforcement of Chapters 12 or 51 of the Milwaukee Code of Ordinances or Section 66.05, Wis. Stats. (1979) or any other provision of law under which the City orders persons to vacate their homes pursuant to its police powers.

2. Within thirty (30) days after the entry of this order, the City of Milwaukee, Department of Building Inspection and Safety Engineering, shall compile and serve on plaintiffs' counsel the following information from City records with regard to each person described in ¶ 1:

a. Name, address from which ordered to vacate and last known address, if different or more current;

b. Date of order to vacate.

3. The Department of Building Inspection and Safety Engineering shall, within forty-five (45) days after entry of this order, send each person described in ¶ 1 and identified in ¶ 2, by first-class mail, address correction requested, a notice and a claim form.

4. The Department of Building Inspection and Safety Engineering shall provide additional notice to the plaintiff class described in ¶ 1. This notice shall be published in the Milwaukee News Section of the *Milwaukee Journal* on each Sunday and Monday that falls within the thirty (30) days beginning thirty (30) days after the entry date of this order. Identical notice shall also be published during this period in the *Spanish Journal* and the *Milwaukee Courier*. It shall also be broadcast at least once a day on these days on radio stations WAWA (AM 1590) and Radio Rey (WYLO – AM 540). Finally, a poster on which the notice is reproduced shall be made available for display at each of the places listed in Exhibit A, attached hereto.

5. The notices shall be substantially as follows:

NOTICE

The United States District Court in Milwaukee, in the case of *Devines v. Maier*, (78-C-742) has ordered the City of Milwaukee to pay certain relocation benefits to certain displaced tenants. If you were a tenant who was ordered, by the City Building Inspector, after November 20, 1978, to vacate property you were renting because of the conditions of the property, you *may* now be entitled to payments to reimburse you for the expenses you incurred in locating another place, the cost of moving, and any increased rent you have had to pay. These payments could amount to maximums of $200 for expenses in locating a new unit, $300 for moving costs, and $4,000 to cover rent increases over 4 years. For more information call

Legal Action of Wisconsin, Inc.
Attorneys for the Plaintiffs
278-7722

or

Milwaukee Building Inspector
278-3646

The notices mailed to potential claimants under ¶ 3 of this order shall state which office of the City of Milwaukee the claims should be filed with or mailed to, and that claim forms must be received no later than four (4) months after the date on which the notices are mailed out. Public notices under ¶ 4 of this order shall state that claim forms are available in the office of the Commissioner of Building Inspection and Safety Engineering and in the office of the Commissioner of the Department of City Development of the City of Milwaukee, and that claims must be filed no later than three (3) months after the date of last publication of the notice. All notices shall advise of the right to an administrative hearing under Wis. Stat. § 32.20 to resolve disputes as to an individual's entitlements, and shall explain how to receive such a hearing.

6. The claim forms shall be available in the office of the Commissioner of Building Inspection and Safety Engineering and in the office of the Commissioner of the Department of City Development. The claim forms shall be jointly drafted by counsel herein. The claim forms shall seek substantially the same information as that sought on forms used by the City of Milwaukee to determine entitlements to benefits under Wis. Stat. § 32.19.

7. Claimants shall be entitled (presuming sufficient information presented in claim and further presuming claimant not disqualified under ¶ 8 *infra*) to:

a) Rent differential payment equal to the difference between the rent of the unit which they were ordered out of and the rent of the unit into which they moved for the period of their unexpired leasehold in their former unit, provided that rental for the new unit was higher than the rental for the former unit (e.g., month-to-month tenants ordered out during month would have right to receive rent differential for remainder of month and succeeding month).

b) Actual moving expenses.

c) Actual moving related expenses.

8. Claims shall be processed by defendant City of Milwaukee in accordance with Wis. Stat. § 32.20, defendant City of Milwaukee may deny a claim on the

basis of insufficiency of information contained in claim or because:

a) The uninhabitable state of the unit in question was caused as a result of claimant's own conduct in violation of a tenant's duties under § 704.03(3)(a) Stats., and § 12–15(1)(b) Milwaukee Code of Ordinances; or

b) Any provision of § 32.19, Stats., was not complied with by claimant, including ninety (90) day residency requirement of § 32.19 (4)(b).

9. Claimants shall assign to the City of Milwaukee the right to proceed against claimants' landlord for recovery of any payments made by the City to the claimants under the terms of this order.

10. Any individual who, after the entry of this order, is required to vacate his or her rented home as a result of the City of Milwaukee's enforcement of Ch. 12 or 51 of the Milwaukee Code of Ordinances or Wis. Stat. § 66.05, shall be served with a notice that he or she may be entitled to compensation under Wis. Stat. § 32.19. The notice shall be personally served or sent by certified and regular first-class mail to the address from which the person has been ordered to vacate or any later address, address correction requested. Notices may be served by placarding the premises if personal service at individual residence is not possible. Claims must be filed within the time period provided under § 32.20 Wis. Stats. and shall be processed in accordance with § 8 *supra*.

11. On or before January 31, 1983, defendant City of Milwaukee shall file and serve its response to the plaintiffs' request for an award of attorney fees. Any reply by the plaintiffs shall be filed no later than February 9, 1983.

Dated at Milwaukee, Wisconsin, this 21 day of Jan, 1983.

UNITED STATES DISTRICT COURT
By: John W. Reynolds
Chief Judge

Community Relations
Social Development Commission
(CR-SDC)
1927 N. 4th Street

Cooperation West Side
Association
(COWSA)
1418 North 27th Street

Department of Social Services
(Milwaukee County)
1220 West Vliet Street

Friendship House
1029 North Marshall

Harambee Ombudsman Project
929 North 6th Street

Indian Urban Affairs Council
1410 North 27th Street

Latin American Union for
Civil Rights
(LAUCR)
806 South 5th Street

Milwaukee Christian Center
2137 West Greenfield

Project Involve
1927 N. 4th Street
Eastside:
931 East Ogden Avenue
Northwest Center:
2816 North Teutonia Avenue
Southside:
1311 West Lincoln Avenue

Salvation Army Emergency Lodge
1730 North 7th Street

United Migrant Opportunity
Services
(UMOS)
809 West Greenfield

Commission on Community Relations
(CCR)
1101 West National Avenue and
2442 W. Capitol Dr.

East Side Housing Action Committee
(ESHAC, Inc.)
531 East Burleigh

Esperanza Unida
1334 South 11th Street

Community Advocates
3517 West Burleigh

House of Peace
1702 West Walnut Street

Inner City Development Project
(ICDP)
Northside: 2803 North Teutonia Avenue
Southside: 931 West Madison

Lutheran Social Services
3200 West Highland Blvd.

16th Street Health Center
1036 South 16th Street

Protective Services for the Elderly
230 West Wells Street

Sojourner Truth House
P.O. Box 03110

West Side Community Center
546 North 31st Street

Rescue Mission
1023 North 5th Street

Department of City Development
(all Public Housing Projects operated
by the Housing Authority for the
City of Milwaukee)
734 N. 6th Street

United States District Court
FOR THE
EASTERN DISTRICT OF WISCONSIN

DELORES DEVINES, et al.,

vs.

HENRY W. MAIER, et al.

CIVIL ACTION FILE NO. 78-C-742

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable JOHN W. REYNOLDS, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that judgment is granted in favor of the plaintiff class and that claims of individual class members shall be made against the defendants pursuant to the procedures established by the order of the Honorable John W. Reynolds in this action dated January 21, 1983.

Dated at Milwaukee, Wisconsin, this 21st day of January, 1983.

SOFRON B. NEDILSKY
Clerk of Court
By: [/s/] Rita Freis
Deputy Clerk

APPENDIX C

Delores DEVINES, Antoinette Stokes, Sarita Beason, and Nick Southerland, individually and on behalf of all other persons similarly situated, Plaintiffs-Appellants,

v.

Henry W. MAIER, individually and in his official capacity as Mayor of the City of Milwaukee; Wallace Burkee, individually and in his official capacity as Director of the Community Development Agency; William Ryan Drew, individually and in his official capacity as Commissioner of the Department of City Development; Gerald Anderson, individually and in his official capacity as Department of City Development Relocation Officer; Leonard E. Sloane, individually and in his official capacity as Deputy Inspector of Buildings; the City of Milwaukee, a municipal corporation; and their agents, employees, successors in office, assistants, and all others acting in concert or cooperation with them or at their direction or under their control, Defendants-Appellees.

No. 80–2315.

United States Court of Appeals,
Seventh Circuit.

Argued April 15, 1981.
Decided Nov. 23, 1981.

Tenants who had been evicted from substandard housing by city sought compensation under the Fifth Amendment, state law, and the Uniform Relocation Act. The United States District Court for the Eastern District of Wisconsin, John W. Reynolds, Chief Judge, 494 F.Supp. 992, entered judgment in favor of city and tenants appealed. The Court of Appeals, John W. Peck, Senior Circuit Judge for the Sixth Circuit, sitting by designation, held that: (1) eviction was a taking entitling the tenants to just compensation under the Fifth Amendment; (2)

tenants were entitled to compensation under state law; but (3) city's action did not result in any acquisition of the property so that the tenants were not displaced persons entitled to Uniform Relocation Act benefits.

Affirmed in part and reversed in part and remanded.

Fairchild, Senior Circuit Judge, filed a concurring opinion.

1. Eminent Domain — 82

Leasehold interests are property interests protected by the Fifth Amendment. U.S.C.A. Const.Amend. 5.

2. Eminent Domain — 2

Fifth Amendment taking can occur through the exercise of the police power to regulate property rights; in order for a regulatory taking that requires just compensation to occur, the exercise of a police power must both benefit the public and result in the destruction of the use and enjoyment of the legitimate private property right; whether or not a regulation of private property rights for a public purpose constitutes a taking depends upon the extent of interference with the private right. U.S.C.A.Const. Amend. 5.

3. Eminent Domain — 2(1.1)

Fact that city housing code was not intended to appropriate private property did not preclude a finding that orders of the city requiring certain tenants to vacate the premises because they were not inhabitable was a compensable regulatory taking. U.S.C.A.Const.Amend. 5.

4. Eminent Domain — 2(1.1)

Property interests of landlords and of tenants were not the same for purposes of determining whether orders of eviction based on fact that buildings were determined to be uninhabitable was a compensable regulatory taking. U.S.C.A.Const.Amend. 5.

5. Eminent Domain — 2(1.1)

Because primary benefit to tenants of their leaseholds was the right to occupy the leased property, the effect of city orders to vacate the premises because they were

uninhabitable was to so completely destroy the tenants' property rights as to amount to a regulatory taking. U.S.C.A.Const.Amend. 5.

6. Constitutional Law — 277(1)

Fact that state law made continued occupancy of buildings illegal after they were determined to be uninhabitable did not preclude finding that tenants had legitimate rights to occupy the structures, so that orders to vacate interfered with legal property interests of the tenants. U.S.C.A.Const.Amend. 5.

7. Eminent Domain — 2

State may not severely limit or otherwise destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed. U.S.C.A.Const.Amend. 5.

8. Health and Environment — 32

Existence of state laws and city ordinances prohibiting occupancy of uninhabitable buildings did not give tenants of uninhabitable buildings notice that they could have no valid leasehold interests in substandard housing.

9. Health and Environment — 32

Wisconsin state laws and Milwaukee city laws which provide that some structures may be legally uninhabitable are not self-executing. W.S.A. 66.05(1)(a).

10. Eminent Domain — 2(1.1)

For purposes of determining whether a compensable taking occurred, orders requiring tenants of substandard housing to vacate the premises because they were uninhabitable were issued for a public purpose and not merely for the private benefit of the tenants. W.S.A. 66.05(1)(a).

11. Eminent Domain — 2(1.1)

Tenants of substandard housing who were required to vacate the premises by city orders following determi-

nations that the buildings were uninhabitable suffered a taking of their property and were entitled to just compensation. U.S.C.A.Const.Amend. 5.

12. Eminent Domain — 2(1.1.)

Tenants of substandard housing who were ordered to vacate the premises by city upon determination that the buildings were uninhabitable were entitled to just compensation under state law. W.S.A. 32.19.

13. United States — 82(5)

Although police power regulation which has the effect of granting affirmative property rights to the government may effect an acquisition of property or property rights sufficient to meet the requirements of the Uniform Relocation Act, enforcement of laws which are merely restrictions of individual rights does not constitute such acquisition. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 101(6), 42 U.S.C.A. § 4601(6).

14. United States — 82(5)

City's enforcement of housing codes by eviction of tenants from uninhabitable housing did not constitute an "acquisition" for purposes of the Uniform Relocation Act and the tenants were not "displaced persons" entitled to URA benefits. Uniform Relocation Assistance and Real Property Acquisition Polices Act of 1970, § 101(6), 42 U.S.C.A. § 4601(6).

See publication Words and Phrases for other judicial constructions and definitions.

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Patrick B. McDonnell, Milwaukee, Wis., for defendants-appellees.

Before FAIRCHILD, Chief Judge, PECK,* Senior Circuit Judge, and SPRECHER, Circuit Judge.

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* Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

JOHN W. PECK, Senior Circuit Judge.

Plaintiffs in this class action are residents of Milwaukee who were required by the City to vacate their rented homes as a result of the City's enforcement of its housing code. Plaintiffs contend that they are entitled to compensation for their displacements from their residences pursuant to the just compensation clause of the Fifth Amendment to the United States Constitution; Wisconsin's eminent domain statute, *Wis.Stats.* § 32.19; and the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), 42 U.S.C. § 4601 *et. seq.*[1] Defendants are the City of Milwaukee and various of its public officials.

The material facts relative to defendants' alleged liability are not disputed. Under 42 U.S.C. § 5305(a)(3), Milwaukee received federal funding for an Intensive Code Enforcement Program (ICEP), designed to improve housing code enforcement in certain deteriorating neighborhoods in order to arrest the decline of those neighborhoods. Additionally, Milwaukee received federal funds under 42 U.S.C. § 5305(a)(11) for a Code Enforcement Relocation Program (CERP), designed to provide relocation payments and assistance to persons displaced by activities funded under 42 U.S.C. § 5301, *et seq.*, the Housing and Community Development Act of 1974. Due to certain restrictive eligibility requirements imposed by Milwaukee on CERP benefits, not all tenants displaced as a result of ICEP activities were entitled to CERP assistance. Plaintiffs are that class of tenants who were displaced by housing code enforcement activities, but who were denied relocation benefits.

According to Milwaukee's CERP Policy Statement, only those tenants who were required to vacate their residences because the City had ordered the buildings in which they lived razed and removed, pursuant to Wisconsin law, were eligible for relocation benefits. District court opinion, 494 F.Supp. 992, 994 (E.D.Wis.1980). However,

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1. At trial the plaintiffs had also claimed rights to compensation under the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.*, but have not appealed from the district court's grant of summary judgment for the defendants on this claim.

under the City's housing code enforcement program, tenants were not ordered to vacate their homes only when their buildings were subject to a raze and remove order. Rather, the vast majority of the orders to vacate were the result of the city's determination that various dwellings were unfit for human habitation, but not so dilapidated as to require razing. Accordingly, the City denied relocation benefits to tenants displaced from these buildings. Defendants refer to the code violations leading only to vacation orders but not to raze and remove orders as "temporary" violations. However, as the district court noted, the practical effects on the tenants are the same whether they are displaced because of "temporary" code violations or because of violations so severe as to result in raze and removal orders. *Id.* In either case, the displaced tenants were required to find alternative housing and to undertake the burden of moving from their homes as a result of the City's action.

As the district court noted, it is important to state at this point that the plaintiffs have not challenged Milwaukee's CERP eligibility requirements on equal protection grounds. Rather, they assert substantive rights to compensation derived from the just compensation clause of the Fifth Amendment to the United States Constitution and rights to compensation based on federal and state laws. These claims will be dealt with separately.

THE JUST COMPENSATION CLAUSE

The Fifth Amendment, made applicable to the States by the Fourteenth Amendment, provides, "[N]or shall private property be taken for public use, without just compensation." Plaintiffs contend that their leasehold interests were private property that was taken by the City of Milwaukee for a public purpose when the City acted to enforce its housing code by evicting plaintiffs from their homes.

[1, 2] As the district court stated, leasehold interests are property interests protected by the Fifth Amendment. *See e.g., Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 303, 96 S.Ct. 910, 916, 47 L.Ed.2d 1 (1976); *United States v. Petty Motor Co.*, 327 U.S. 818, 66 S.Ct.

813, 90 L.Ed. 1040 (1946). Furthermore, as the district court also noted, the fact that the city did not acquire the tenants' leaseholds, but rather exercised a police power to regulate the tenants' enjoyment of their leaseholds, is not dispositive. It is well established that a Fifth Amendment "taking" can occur through the exercise of the police power to regulate property rights. *E. g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 326, 62 L.Ed.2d 210 (1979). In order for a regulatory taking that requires just compensation to occur, the exercise of a police power must both benefit the public and result in the destruction of the use and enjoyment of a legitimate private property right. *Kaiser Aetna, supra*, at 178–80, 100 S.Ct. at 392–93. *United States v. Dickinson*, 331 U.S. 745, 750–51, 67 S.Ct. 1382, 1385–86, 91 L.Ed. 1789 (1947). To a great extent, whether or not a regulation of private property rights for a public purpose constitutes a taking depends on the extent of interference with the private right. When the "regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922). *See also, Kaiser Aetna, supra; Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

To the inquiry whether the City's enforcement of its housing regulations interfered with plaintiffs' legitimate property interests, the extent of any such interference, and whether the regulations advanced a public purpose, the district court added the question whether the regulation was intended to effectuate takings of private property. Deciding that,

> Housing code enforcement is a valid and important exercise of the municipal police power . . . not designed to appropriate property for public use at private expense [citation omitted], but rather . . . designed to prevent the injury and disease which are so often the by-products of substandard housing.

494 F.Supp. at 995, the district court concluded that no Fifth Amendment taking requiring just compensation

occurred. The district court also considered it significant that there has never been a case holding that owners of buildings vacated or razed due to building code violations are entitled to just compensation, and concluded that there is no distinction of constitutional significance between landlords and tenants under such circumstances. *Id.*

[3] We conclude that the district court erred in deciding that because the housing code was not intended to appropriate private property no regulatory taking occurred. "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298, 88 S.Ct. 438, 443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring) (emphasis in original); *see, Davis v. Newton Coal Co.*, 267 U.S. 292, 301, 45 S.Ct. 305, 306, 69 L.Ed. 617 (1925). Public takings of private property may occur as the result of regulations intended only to promote public health, safety or morals. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting and expressing the view of at least five members of the Court as to the merits).

[4] In our view, the district court also erred to the extent that its conclusion was reached by equating the property interests of landlords and the plaintiff tenants. The determination whether a regulation effectuates a taking of private property requires an examination of the extent to which the regulation interferes with the owner's property interests. Because the rights of landlords and the rights of tenants are different rights, the effect of a regulation on those rights must be separately considered. Whereas enforcement of housing codes or zoning laws to prohibit human habitation may leave the owner with significant residual property rights so that the owner's rights may not be so interfered with as to be "taken" from him, *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980); *Amdur v. City of Chicago*, 638 F.2d 37 (7th Cir. 1980), the tenant whose right to occupy the premises is extinguished has nothing left and the impact of the regulation on his rights could not be more severe.

[5] Having concluded that the district court's analysis of the plaintiffs' constitutional claim was erroneous, we must now determine whether, as a matter of law, summary judgment for the defendants on plaintiffs' constitutional claim was nonetheless correct under the appropriate analysis. The district court assumed that the plaintiffs' leasehold interests were property interests subject to Fifth Amendment protection and that the City's orders to vacate effectively destroyed the value of those rights. 494 F.Supp. at 995. Because the primary benefit to the tenants of their leaseholds was the right to occupy the property leased, it is indisputable that the effect of the orders to vacate was to so completely destroy the plaintiffs' property interests that regulatory takings must have occurred if the remaining requirements for such a taking also occurred.

[6] On appeal, defendants contend that the plaintiffs enjoyed no legally cognizable leasehold interests to occupy buildings that the Department of Building Inspection and Safety Engineering had determined to be uninhabitable. The defendants argue that because state law made continued occupancy of the buildings illegal, the plaintiffs had no legitimate rights to occupy the structures and thus that the orders to vacate did not interfere with any legal property interests of the plaintiffs.

[7] Defendants' argument cannot be approved without obliterating the Fifth Amendment protection against regulatory takings that benefit the public at the expense of the individual. Every regulation of private property limits the use of that property by the owner and makes certain uses "illegal." It is the very fact that a regulation enacted for the public benefit may deny an individual a use of his property that he would otherwise enjoy that gives rise to the Fifth Amendment inquiry whether the regulation causes the individual to bear a burden that in fairness should be distributed among all those benefited. Thus, where a police power regulation validly makes illegal the continued exclusion of the public from previously private property, *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), or requires that private property be preserved as

a parkland and makes illegal any development of the property, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting), the Fifth Amendment requires that the owner be compensated. The state may not severely limit or otherwise destroy private property rights and escape the obligation of just compensation by the circular reasoning that the private right was invalidated by the regulation and therefore never existed.

[8] The defendants seek to fortify the argument that the plaintiffs had no legal rights under state law to inhabit their homes through the contention that the existence of state laws and city ordinances prohibiting occupancy of "uninhabitable" buildings gave the plaintiffs notice that they could have no valid leasehold interests in substandard housing. Thus, the defendants seek to distinguish this case from instances where a regulation effects a taking of an existing legitimate property interest by contending that the plaintiffs either never acquired any legal rights to occupy because the buildings were substandard before the plaintiffs became tenants, or that those rights were extinguished automatically at the moment the buildings failed to meet the housing code standards. The defendants in essence argue that the plaintiffs had no more rights to occupy their buildings before the orders to vacate were issued than would the manufacturer of illegal whiskey have the right to own a secret distillery, and that neither the destruction of the plaintiffs' occupancies nor the destruction of the illegal still interferes with legitimate property rights.

Defendants' argument presupposes that Wisconsin law and the Milwaukee housing code specifically define an "uninhabitable" building in a way that clearly makes occupancy of specific buildings illegal and requires no administrative or executive action or discretion to determine inhabitability. In the absence of such specificity, the statutes and codes alone cannot identify specific structures that are legally uninhabitable and thus not subject to leasehold rights.

In the present case, plaintiffs were ordered to vacate their homes on the authority either of *Wis.Stats.* § 66.05

or section 51–54 or section 12–4 of the Milwaukee Code of Ordinances. *Wis.Stats.* § 66.05(1)(a) states that municipal building inspectors *may* (a discretionary term) issue an order to raze and remove or to repair and make safe any

> building or part thereof . . . which in its *judgment* is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation, occupancy, or use. (Emphasis added.)

Section 66.05(2)(a) states that, upon determining that a building is unfit for human habitation, the building inspector has the duty to prohibit occupancy and shall post a placard on the premises containing the words: "This Building Cannot Be Used For Human Habitation, Occupancy Or Use." The Milwaukee Code of Ordinances §§ 51–14(1) and (2) authorize the building inspector to condemn a building for human habitation when the inspector finds conditions that endanger the welfare of the occupants or the public. Milwaukee Code § 12–4(c) authorizes the building inspector to order the discontinuation of occupancy whenever a structure is in violation of any regulation of the code, and § 12(g) requires the inspector to post a vacation notice in such circumstances.

[9] Clearly, the Wisconsin and Milwaukee laws which provide that some structures may be legally uninhabitable are not self-executing. Rather, these laws provide that the determination that a building is uninhabitable requires an administrative determination that involves the discretion of the building inspector. In *Posnanski v. Hood*, 46 Wis.2d 172, 174 N.W.2d 528 (1970), a tenant sought to assert as an affirmative defense to an action for rent alleged Milwaukee Housing Code violations which the tenant contended made the premises untenantable under city ordinance. The Wisconsin Supreme Court held that the tenant had no such affirmative defense because the housing code provisions in question contained phrases such as:

> "reasonably good state of repairs"; "clean and sanitary condition"; "adequately"; "reasonably good working condition"; and other general terms which leave a great deal of discretion to those enforcing the code.

Id. at 532. The court concluded that these discretionary terms indicated the intention that the housing code be enforced by administrative order and that absent such orders tenants could not allege violations of the housing code as a defense to non-payment of rent.

The same reasoning must be applied in the present case to answer the question whether the plaintiffs enjoyed legitimate rights to occupy the premises that they had rented prior to any administrative determination that their dwellings were legally unfit for human habitation. Whether their homes were so dangerous, unsafe, or unsanitary as to require vacation for the protection of the occupants and the general welfare was a "judgment," *Wis.Stats.* § 66.05(1)(a), to be made by the proper administrative authority. Unless and until such judgment was made and the appropriate procedural steps subsequently taken, the plaintiffs' homes were legally inhabitable under the laws of the State and the City.

We have thus far concluded that the plaintiffs enjoyed legal rights to occupy their rental dwellings until those rights were terminated by the enforcement of the housing code by the City. We have also noted that those rights were so completely destroyed by the City's action that a regulatory taking of plaintiffs' rights occurred. The remaining step in the analysis of the plaintiffs' Fifth Amendment claim requires the determination whether the regulatory takings that were effected by the enforcement of the housing code were for a public purpose and thus constituted public takings.

[10] The defendants, at different points in their brief, argue both that enforcement of the housing code by issuing orders to vacate was for the benefit of the public and that it was not. In arguing that the plaintiffs suffered no loss as a result of being displaced from their homes, the defendants state that the plaintiffs were the only persons receiving any direct benefit from enforcement of the housing code. The defendants, with overt paternalism, argue that the plaintiffs (each of whom had presumably chosen to live in buildings of dubious quality because in their individual best judgments such was the best alternative within their means and available to them) were the

primary beneficiaries of being ordered from their homes. In some cases plaintiffs were ordered to vacate "immediately," in other cases they were given 72 hours or seven days notice to leave. These orders were accompanied by threat of prosecution for failure to comply, a threat that in some instances was carried out. The City argues that any benefit to the community in general resulting from plaintiffs being forced out of their homes was an indirect by-product of the direct benefit to the tenants of being relieved of their substandard housing. In contrast, at another point in their brief, the defendants argue that the enforcement of building codes is the legitimate exercise of a police power to forbid uses of private property which effect public nuisances that cause a detriment to public health and safety.

Whether a police power regulation of private property that does not bear a substantial relation to public health, safety, morals, or the general welfare can be constitutionally exercised may be subject to question. In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981), Justice Brennan, dissenting, expressed the view of five members of the court that, "Because police power regulations must be substantially related to the advancement of the public health, safety, morals, or general welfare, see *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926), it is axiomatic that the public receives a benefit while the offending regulation is in effect." *Id.* 450 U.S. at 656, 101 S.Ct. at 1306. However, a footnote to this statement refers to the possibility of a situation in which a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that any "taking" effected by the regulation is not for public use and therefore not compensable under the just compensation clause. *Id.* 450 U.S. at 656, 101 S.Ct. at 1306, n.23.[2] The defendants in the present case contend that we have this latter situation now before us.

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2. Justice Brennan indicated that in this latter circumstance the property owner may have a damage cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment due process violation.

Defendants' argument is refuted by the introductory statement of purpose made by the City of Milwaukee when its housing code was enacted.[3] In that statement the City declared that enactment of the housing code was essential to the public interest because:

Part 2. It is hereby found and declared that premises exist within the City of Milwaukee which are blighted because there exists thereon blighted buildings, or other structures, either occupied or unoccupied by human beings, and such buildings or other structures are blighted because faulty design or construction, or failure to keep them in a proper state of repair, or lack of proper sanitary facilities, or lack of adequate lighting or ventilation, or inability to properly heat, or improper management, or any combination of these factors has resulted in such buildings or structures becoming so deteriorated, so delapidated, so neglected, so overcrowded with occupants, or so unsanitary as to jeopardize and be detrimental to the health, safety, morals, or welfare of the people of the city. It is hereby further found and declared that such blighted premises and such blighted buildings or other structures contribute to the development of, or increase in, disease, infant mortality, crime and juvenile delinquency; that conditions existing on such blighted premises are dangerous to the public health, safety, morals, and general welfare of the people, that conditions existing on such blighted premises necessitate excessive and disproportionate expenditure of crime prevention, fire protection, and other public services; that the conditions existing on blighted premises cause a drain upon public revenue and impair the efficient and economical exercise of governmental functions in such areas. It is hereby further found and declared that the elimination of blighted premises and the prevention of occurrence of blighted premises in the future is in the best interests of the citizens of this city, of the State of Wisconsin, and of the entire United States; and that the accomplishment

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3. The Statement of Purpose of the City of Milwaukee's housing code was originally codified at § 75-2 of the Milwaukee Code of Ordinances and subsequently was repealed and codified throughout the present Chapter 51 of the Milwaukee Code of Ordinances.

of this end will be fostered and encouraged by the enactment and enforcement of this ordinance.

Clearly, the City of Milwaukee sought to enact and enforce a housing code because of the benefits that would accrue to the public. Furthermore, the State of Wisconsin has also recognized in various legislative enactments that the public is served by laws aimed at eliminating substandard urban housing. *E. g.*, Urban Redevelopment Act, *Wis.Stats.* § 66.405(2); Blight Elimination and Slum Clearance Act, *Wis.Stats.* § 66.431(2); Urban Renewal Act, *Wis.Stats.* § 66.435(2).

There can be little question but that the public has legitimate interests in reducing the incidence of substandard urban housing. Of course, that goal is made difficult to achieve by the fact that some members of the community are unable to afford the cost of housing that is maintained to housing code standards. In combatting the problem, the City of Milwaukee had various options available to it. It might, for example, have sought to enforce its orders to repair directly against the owners of substandard structures. Milwaukee chose instead to evict the tenants of substandard housing from their homes. While it is entirely possible that the public purpose of improving the physical structures of decayed buildings may not be served by this action, there is a possibility that the City's action will cause some landlords to improve their properties so that they may once again receive rental income. However, even if the substandard structures vacated by order of the City remain vacant because improvements are economically unfeasible in light of the potential rental income, then the public's avowed interests in reducing unsanitary and overcrowded conditions that promote disease and crime and adversely affect public morals are still ostensibly served by the City's enforcement of its housing code through evictions.

[11] We conclude that the City of Milwaukee terminated the leasehold rights of the plaintiffs to occupy their homes in order to promote public interests in safety, health, morals, and the general welfare. In doing so, the City placed a disproportionately heavy burden on those individual members of the community who have little or

no choice but to live in low cost, often substandard, housing. The fairness dictated by the Fifth Amendment requires that the economic burden borne by the plaintiffs for the benefit of the community be distributed among those benefited. We hold therefore that the plaintiffs are entitled by the Fifth Amendment to just compensation for the regulatory taking of their leasehold rights for a public purpose, and the judgment for defendants on plaintiffs' constitutional claim must be reversed and the case remanded for further proceedings on the question of what compensation is just.

COMPENSATION UNDER Wis.Stats. § 32.19

The district court exercised pendent jurisdiction over the plaintiffs' claim for compensation under *Wis.Stats.* § 32.19. Citing *Howell Plaza, Inc. v. State Highway Commission*, 66 Wis.2d 720, 226 N.W.2d 185 (1975), the district court held that section 32.19, "is merely the legislative implementation of the just compensation requirement . . . which, as discussed above, is not applicable under these circumstances." 494 F.Supp. at 995.

[12] On appeal, both plaintiffs and defendants agree that the district court was correct in its determination that section 32.19 merely implements the just compensation requirement, and each reiterate their respective arguments concerning the question whether the City's orders to vacate constituted a taking of legitimate private property interests for public purposes. Thus our conclusion regarding the plaintiffs' Fifth Amendment claim is dispositive of the issue whether plaintiffs are entitled to compensation under *Wis.Stats.* § 32.19. Additionally, we note that the Wisconsin Supreme Court's interpretation of section 32.19 is consistent with our analysis of the just compensation clause. *See Maxey v. Redevelopment Authority of Racine*, 94 Wis.2d 375, 288 N.W.2d 794 (1980) (city causing tenants to vacate property constituted a taking of tenant's leasehold interests); *Howell Plaza, Inc. v. State Highway Commission*, 92

Wis.2d 74, 284 N.W. 2d 887 (1979) (constitutional taking consists of deprivation of substantially all beneficial use of private property and requires compensation under Chapter 32); *Just v. Marinette City*, 56 Wis.2d 7, 201 N.W.2d 761 (1972) (where a police power restriction of the use of private property is so great that landowner bears unfair burden for the benefit of the public, a constructive taking occurs though government does not acquire the property); *Riebs v. Milwaukee County Park Commission*, 252 Wis. 144, 31 N.W.2d 190 (1948) (just compensation required for value of month-to-month periodic tenancy). Therefore, we conclude that the district court erred in granting summary judgment to defendants on plaintiffs' claim for compensation under *Wis.Stats.* § 32.19.

UNIFORM RELOCATION ACT BENEFITS

On appeal, plaintiffs contend that those members of the plaintiff class evicted from their homes as a result of the defendants' federally supported ICEP program are "displaced persons" entitled to the benefits of the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), 42 U.S.C. § 4601 *et seq.* The protections of the Act are afforded to "displaced persons" as defined by § 4601(6):

> The term "displaced person" means any person who . . . moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or part, or as a result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance.

Plaintiffs argue that the City "acquired" the property on which they had been living when it prohibited further residential use of the property and evicted them.

The district court concluded that the plaintiffs were not "displaced persons" under § 4601(6) because the City did not "acquire" the use of the buildings that it had determined were unfit for human habitation. The district court based this conclusion on its reading of a footnote in

Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 99 S.Ct. 1572, 60 L.Ed.2d 28 (1979). The district court stated that:

> While the [Supreme] Court did state that "acquisition" [under § 4601(6)] does not necessarily require that the government take title to the affected property, there is a requirement that the government take property for its own use.

494 F.Supp. at 996, *citing* 441 U.S. at 62, n.41, 99 S.Ct. at 1587, n.41. The district court concluded that this "use" requirement "clearly calls for physical occupancy or use by the acquiring agency." *Id.* Thus, the district court held that the City had not "acquired" the property from which the plaintiffs were forced to move because the City never physically occupied the buildings, but rather had only evicted the plaintiffs and closed the buildings to further occupancy.

Footnote 41 in *Alexander*, relied on by the district court, does not state that an agency must physically occupy property in order to "acquire" that property under § 4601(6). Rather, that footnote states that the focus of the inquiry regarding "acquisition" is whether an agency obtains "the eventual right to use" the property rather than the agency's method of obtaining that right. 441 U.S. at 62, n. 41, 99 S.Ct. at 1587, n. 41. As an example of "acquisition" without taking title, the footnote offers the Post Office Department's practice of obtaining long term leases of property. The Court noted that persons displaced from such property would be entitled to URA benefits because the Post Office had acquired the eventual right to use the property even though it had not acquired title. Thus, while the *Alexander* footnote defines "acquisition" in terms of the right to use, neither that footnote nor anything else in *Alexander* defines "use."[4]

Thus, *Alexander* is not authority for the district court's conclusion that an "acquisition" sufficient to entitle the plaintiffs to URA benefits could not occur, in

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4. In *Alexander* the Department of Housing and Urban Development had acquired actual title to the property in question as the result of foreclosures, consequently the "right to use" test of acquisition was not an issue.

lieu of passage of title to the City, unless defendants physically occupied the property. Rather, *Alexander's* direction that an acquisition can occur when an agency obtains "the eventual right to use" leaves open the possibility that a police power regulation of private property in furtherance of a federally funded program may "use" the property for a government purpose, even though the government does not acquire title nor take actual possession.

[13, 14] However, the phrases "acquisition of real property," used in § 4601(6), and "right to use property," used by the Supreme Court in defining "acquisition," each carry the connotation of vesting affirmative property rights. This connotation is consistent with the Congressional intent of the URA "to provide better relocation assistance when property is acquired for federal programs, not to extend assistance beyond that limited context to all persons somehow displaced by government programs" (footnote omitted). 441 U.S. at 50, 99 S.Ct. at 1581. Significantly, the URA repealed § 310 of the Housing Act of 1964, 42 U.S.C. § 1465 (1970 ed.), that had extended benefits to persons displaced from urban renewal areas by code enforcement activities. This provision had been the exception to the general pattern of federal benefits being available only when public projects required that the government obtain private property. 441 U.S. at 50, n. 12, 99 S.Ct. at 1581 n. 12. Consequently, while a police power regulation that has the effect of granting affirmative property rights to the government may effect an acquisition of property or property rights sufficient to meet the requirements of § 4601(6), the enforcement of laws that are merely restrictive of individual rights do not constitute such an acquisition. We conclude, therefore, that defendants' enforcement of housing codes by evicting plaintiffs from structures determined by the building inspector to be unfit for human habitation did not constitute an acquisition under 42 U.S.C. § 4601(6), and that the plaintiffs are not "displaced persons" entitled to URA benefits.

For the reasons stated above the judgment of the district court granting summary judgment for the defendants on plaintiffs' claim for benefits under 42 U.S.C. § 4601 *et seq.* is AFFIRMED. The district court's judgment granting summary judgment for the defendants on plaintiffs' claims for just compensation under the Fifth Amendment to the United States Constitution and under *Wis.Stats.* § 32.19 is REVERSED, and the case is remanded for further proceedings. Each party is to bear its own costs of this appeal.

FAIRCHILD, Senior Circuit Judge, concurring.

I agree with the reasoning of the majority and write separately only to express the following points.

I

The applicable statutes leave the determination of habitability to the discretion, not closely circumscribed in terms of necessity for the public welfare, of those charged with their enforcement. (See majority opinion at 143–144.) That being so, an order to a tenant to vacate does not constitute a taking, at least where the premises is not so clearly uninhabitable that no reasonable person could find otherwise. The latter, however, is an issue of fact that has to be left for determination by the factfinder. That is to say, there is a taking only insofar as there was room for the exercise of discretion. Where the evidence of uninhabitability is so overwhelming that no reasonable person could conclude to the contrary the mere adjudication of that status by the state does not require compensation.

II

Although we have not yet arrived at the issue of damages, some expression of caution in that direction is appropriate. A discretionary determination of uninhabitability or other cause to vacate is a taking both of the interest of the owner of the premises (although only a partial taking) and of the tenant. A tenant from month to month has a right to occupy for the baiance of the current month and for the succeeding month, subject to

the payment of rent, and the same is true of a fixed term tenant for the period of his lease. Loss of such rights, as well as the costs of moving, of locating comparable quarters, and so forth would be quantifiable as damages. A tenant might also be able to demonstrate a value for the probability of being able to stay in the future, but that factor is not a certainty and also would be subject to the rental obligation. Further, the tenant may be entitled to recover something from the landlord, assuming some sort of breach on his part, and that recovery may have to be offset against what may be recovered from the governmental entities. The point is that although the tenant may be able to recover some damages for the taking, they may not amount to very much once all of the relevant considerations—including the obligation to pay rent, the speculative nature of continued tenancy, the availability of redress against the landlord, and the like—are taken into account. It only makes sense at this juncture to express this word of caution.

APPENDIX D

Delores DEVINES, Antoinette Stokes, Sarita Beason, and Nick Sutherland, Individually and on behalf of all other persons similarly situated, Plaintiffs,

v.

Henry W. MAIER, Individually and in his official capacity as Mayor of the City of Milwaukee; Wallace Burkee, Individually and in his official capacity as Director of the Community Development Agency; William Ryan Drew, Individually and in his official capacity as Commissioner of the Department of City Development; Gerald Anderson, Individually and in his official capacity as Department of City Development Relocation Officer; Leonard E. Sloane, Individually and in his official capacity as Deputy Inspector of Buildings; the City of Milwaukee, a Municipal Corporation; and their agents, employees, successors in office, assistants, and all others acting in concert or cooperation with them or at their direction or under their control, Defendants.

Civ. A. No. 78-C-742.
United States District Court,
E. D. Wisconsin.
Aug. 9, 1980.

Tenants who were displaced due to temporary or remedial city housing code violations that did not require that the rented premises be razed brought action challenging city's system of housing code enforcement and payment of relocation benefits to persons displaced from their homes as a result of such enforcement. On motions for summary judgment, the District Court, Reynolds, Chief Judge, held that: (1) Fifth Amendment did not require payment of compensation to tenants; (2) tenants were not entitled to compensation as "displaced persons" within the meaning of Uniform Relocation Act; and (3) tenants were not entitled to relocation benefits under terms of Housing and Community Development Act of 1974.

Ordered accordingly.

1. Eminent Domain — 95

Fifth Amendment did not require payment of relocation benefits to city residents who had been displaced due to temporary or remedial housing code violations. U.S.C.A. Const. Amend. 5.

2. United States — 82(5)

City residents who were displaced due to temporary or remedial city housing code violations that did not require that rented premises be razed were not entitled to relocation benefits as "displaced persons" within meaning of Uniform Relocation Act. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 101(6), 42 U.S.C.A. § 4601(6).

See publication Words and Phrases for other judicial constructions and definitions.

3. United States — 82(5)

Not all persons displaced as result of program funded under Housing and Community Development Act of 1974 are entitled to relocation benefits pursuant to Uniform Relocation Act. Housing and Community Development Act of 1974, § 105, 42 U.S.C.A. § 5305; Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, § 217, 42 U.S.C.A. § 4637.

4. United States — 53(9)

Courts have power to review determinations of Secretary of HUD with respect to applications for funding under Housing and Community Development Act of 1974. Housing and Community Development Act of 1974, § 104(c), 42 U.S.C.A. § 5304(c).

5. United States — 82(5)

City residents who were displaced due to temporary or remedial city housing code violations that did not require that rented premises be razed were not entitled to relocation benefits that tenants of condemned building received under city's system of housing code enforcement under Housing and Community Development Act of 1974. Housing and Community Development Act of 1974, § 101(c), 42 U.S.C.A. § 5301(c).

Lawrence G. Albrecht, Thomas P. Donegan, Louis J. Mestre, Legal Action of Wisconsin, Inc., Milwaukee, Wis., for plaintiffs.

James B. Brennan, City Atty. by Maurice L. Markey, Asst. City Atty., Milwaukee, Wis., for defendants.

DECISION AND ORDER

REYNOLDS, Chief Judge.

Plaintiffs in this action for declaratory and injunctive relief have mounted a broad challenge to the City of Milwaukee's system of housing code enforcement and payment of relocation benefits to persons displaced from their homes as a result of such enforcement. The action was brought by four Milwaukee residents who were ordered to vacate their rented living quarters as a result of the City's code enforcement activities.* Although the City provides relocation benefits to some tenants who are forced to leave their homes due to housing code enforcement, none of the named plaintiffs were found eligible to receive such benefits. They were consequently forced to pay the cost of moving to other housing out of their own pockets.

Plaintiffs originally challenged both the denial of benefits and the City's failure to provide them with administrative hearings by which to appeal such denials. The City has since agreed to provide hearings to persons who are declared ineligible for relocation benefits and the only issue that remains is whether the City can restrict the payment of benefits to those persons who meet its eligibility requirements. The City contends that it is not legally obligated to provide any relocation benefits whatsoever and consequently can limit the payment of such benefits in whatever manner it sees fit. Plaintiffs, on the other hand, contend that payments to all displaced tenants are required by the just compensation clause of the Fifth Amendment, Wis. Stats. § 32.19, the Uniform Relocation

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* On September 24, 1979, this Court certified this case as a class action on behalf of all tenants who are or will be displaced from their homes by order of the Milwaukee Department of Building Inspection and Safety Engineering and who fail to receive any financial compensation to which they are legally entitled.

Act, 42 U.S.C. § 4601 *et seq.*, and the Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* Both sides have moved for summary judgment.

The material facts of the instant case are not in dispute. Beginning in 1975, the City has received what are known as Community Development Block Grants from the United States Department of Housing and Urban Development ("HUD"). The block grant program is a method of distributing federal housing and community development funds to the nation's cities in a manner which allows the participating cities to determine, within certain statutory guidelines, precisely how those funds will be spent. The program is administered pursuant to the Housing and Community Development Act of 1974.

A city applying for a block grant from HUD must submit a detailed application describing the different programs to which the grant will be applied. The types of local housing and community development programs which are eligible for block grant funding are set out at 42 U.S.C. § 5305. Among the eligible programs are those designed to improve housing code enforcement in deteriorating neighborhoods, 42 U.S.C. § 5305(3), and those designed to provide relocation payments and assistance to persons who are displaced by activities funded through the block grant program. 42 U.S.C. § 5305(11).

In 1975, the City of Milwaukee submitted its first application for block grant funding. The City applied for and received approximately $13,383,000 from HUD for use in a wide variety of programs designed to improve Milwaukee housing. In particular, $104,500 was allocated to the Intensive Code Enforcement Program ("ICEP"), and $206,400 was allocated to the Code Enforcement Relocation Program ("CERP"). ICEP was designed to improve housing code enforcement in certain deteriorating areas of the City. CERP was designed to provide relocation benefits to occupants of condemned housing.

The City has continued to receive yearly block grant funding from HUD. The ICEP and CERP programs have continued to receive appropriations from the yearly grants. The amounts allocated to ICEP have increased almost yearly since the initial 1975 grant, and now stand at

$400,000 a year. The CERP funding, however, was decreased to $170,000 in 1976, and to $50,000 a year thereafter.

Although the funding allocated to CERP has steadily decreased over the years, the funds that have been allocated have never been fully utilized. From 1975 through 1978, a total of $476,400 was allocated to the CERP while only $116,336 of that amount was actually provided to displaced tenants. The CERP funds that were not used were "reprogrammed" into other block grant programs which came up short of funds in a given year.

The CERP surpluses can no doubt be attributed to the fairly restrictive conditions the City has placed on the distribution of CERP funding. According to the most recent CERP Policy Statement issued by the City, in order to be eligible for CERP benefits, a potential recipient must: (1) reside within the geographic area designated in the City's block grant application (a low income area which is practically coterminous with the ICEP target area); (2) be a "family" or an "individual" which is in lawful occupancy of a rented dwelling; and (3) be served with a "notice to vacate" because the building has been ordered razed and removed pursuant to Wisconsin law. Tenants who are ordered to vacate because their building contains code violations that are not severe enough to require that the building be razed are not eligible for relocation benefits. From 1975 through 1978, the City provided CERP benefits to 52 households which were displaced from buildings scheduled to be razed. During that same time period, 395 households were served with notices to vacate as a result of the City's ICEP activities. A review of the City's code enforcement records shows that the great majority of those required to vacate their living quarters were not eligible for CERP relocation benefits because the code violations at issue were not severe enough to require that the buildings involved be razed.

Therein lies the heart of the present controversy. Plaintiffs and the class they represent are tenants who have been displaced by the City's ICEP activities but who are not eligible for CERP relocation benefits. As demonstrated by the affidavits submitted by the plaintiffs, tenants who

are forced to vacate their living quarters due to remedial code violations are really in no better position than those tenants who are forced to vacate because their buildings are scheduled to be razed. The tenant who is ordered to vacate because of rat infestation or lack of heat, code violations which do not require that the affected building be razed, are still required to find other housing and bear the expense of moving. Once new housing has been located, a lease signed, the security deposit and first month's rent paid, and the household furnishings moved, the displaced tenant cannot be expected to return to his old dwelling once the code violations have finally been corrected. Thus for all practical purposes, tenants forced to relocate due to what the City terms "temporary" code violations are put to the same trouble and expense as tenants who are forced to vacate a building which is scheduled to be razed. The question to be resolved is whether tenants who are displaced due to temporary or remedial code violations are entitled to the same benefits that tenants of condemned buildings now received.

It is important at this point to state what the case is not. Plaintiffs are not raising an equal protection challenge to the City's CERP eligibility requirements. They do not claim that they are entitled to benefits because a similarly situated class already receives them. Instead, they claim a substantive right to such benefits, derived from the United States Constitution and from federal and state law. In order to evaluate plaintiffs' claim it is therefore necessary to examine the various sources of substantive law under which entitlement to the benefits is claimed.

Just Compensation Clause

The Fifth Amendment to the United States Constitution provides "[N]or shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states by operation of the Fourteenth Amendment. *Atlantic Coast Line Railway Company v. City of Goldsboro, North Carolina*, 232 U.S. 548, 555, 34 S.Ct. 364, 366, 58 L.Ed. 721 (1914). The question posed by the plaintiffs is whether the City must compensate tenants whose leasehold rights are "taken" as a result of the City's code enforcement activities.

It is well established that leasehold interests are property within the meaning of the Fifth Amendment. *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Thus if the government physically appropriates premises formerly occupied under a valid lease, it is required to compensate the leaseholder for the loss it incurs. *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). In this case, of course, the City has not attempted to take physical possession of the living quarters occupied by the plaintiffs. Arguably, however, the City, by requiring the plaintiffs to vacate the premises, has effectively destroyed the value of their leasehold interests. Under some circumstances, government regulations which have the effect of drastically reducing the value of a property interest will be held to be a compensable taking. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

Traditionally, however, government regulations which are designed to promote public health and safety are not considered takings which require the payment of compensation even though such regulations may totally destroy the value of the affected property. Significantly, it has never been held that *owners* of buildings which are placarded or razed due to building code violations are entitled to just compensation. See, Mandelker, *Housing Codes, Building Demolition, and Just Compensation: A Rationale for the Exercise of Public Powers Over Slum Housing*, 67 Mich.L.Rev. 6345 (1969); *Annotation: Constitutional Rights of Owners as Against Destruction of Building by Public Authorities*, 14 A.L.R.2d 73 (1950) and the cases cited therein.

[1] Plaintiffs suggest no reason why the rule should be different for tenants. While a tenant forced to relocate due to code enforcement may be a more sympathetic figure than his landlord, the distinction is without constitutional significance. Housing code enforcement is a valid and important exercise of the municipal police power. Such measures are not designed to appropriate property for public use at private expense. *Armstrong v. United*

States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1969), but rather are designed to prevent the injury and disease which are so often the byproducts of substandard housing. The power of municipal governments to so protect their citizens cannot "consistently with the existence and safety of organized society" be burdened with the requirement that compensation be paid to anyone who is put to expense be the exercise of that power. *Mugler v. Kansas*, 123 U.S. 623, 669, 8 S.Ct. 273, 301, 31 L.Ed. 205 (1887).

This conclusion also disposes of plaintiffs' argument that compensation is required by § 32.19 of the Wisconsin Statutes. Chapter 32 dealing with the powers of eminent domain is merely the legislative implementation of the just compensation requirement, *Howell Plaza, Inc. v. State Highway Commission*, 66 Wis.2d 720, 226 N.W.2d 185 (1975), which, as discussed above, is not applicable under these circumstances.

Uniform Relocation Act

Plaintiffs next argue that they are entitled to compensation as "displaced persons" within the meaning of the Uniform Relocation Act, 42 U.S.C. § 4601 *et seq.* Section 4601(6) of the Act defines "displaced person" as:

> " * * * [A]ny person who * * * moves from real property, or moves his person property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance. * * * "

Persons who qualify under this definition are eligible for a variety of federal relocation benefits. See 42 U.S.C. §§ 4622–4625. Plaintiffs claim entitlement to such benefits as persons forced to move from real property as a result of a written order of an acquiring agency for a program undertaken with federal financial assistance.

The United States Supreme Court has recently analyzed the Uniform Relocation Act and concluded that payments are only required in connection with "the actual or proposed acquisition of property for a federal program." *Alexander v. United States Department of Housing and Urban Development*, 441 U.S. 39, 62, 99 S.Ct. 1572, 1587,

60 L.Ed.2d 28 (1979). "Congress did not expect to provide assistance for all persons somehow displaced by Government programs." *Id.* at 60, 99 S.Ct. at 1585. The purpose of the Act is "limited" and is not to be expanded beyond the acquisition context. *Id.* at 57–58, 99 S.Ct. at 1584–85.

[2] While the Court did state that "acquisition" does not necessarily require that the government take title to the affected property, there is a requirement that the government take the property for its own use. *Id.* at 62–63 n. 41, 99 S.Ct. at 1586–87 n. 41. In the instant case, it cannot be said that the City has acquired or obtained the use of the buildings it placards for code violations. The Act clearly calls for physical occupancy or use by the acquiring agency. The fact that the City orders a building closed does not mean that the City has acquired the building's use. Accordingly, plaintiffs cannot be considered "displaced persons" entitled to relocation benefits under the Act.

Plaintiffs also contend that they are entitled to benefits under 42 U.S.C. § 4637. That section provides that persons who move from their dwellings as a result of any program which receives funding under Title 1 of the Housing Act of 1949 "shall be deemed to be displaced as the result of the acquisition of real property" and thus eligible for benefits under the Act.

Plaintiffs concede that ICEP is funded pursuant to the Housing and Community Development Act of 1974 rather than the Housing Act of 1949. They argue, however, that since the Housing and Community Development Act of 1974 was passed after the enactment of the Uniform Relocation Act and since the purpose of the Housing and Community Development Act of 1974 was to consolidate and simplify programs previously funded under the Housing Act of 1949, that programs funded under the Housing and Community Development Act of 1974 should be treated in the same manner as programs funded under the Housing Act of 1949 for purposes of eligibility for benefits under the Uniform Relocation Act.

[3] The fallacy of this argument is demonstrated by the fact that when Congress passed the Housing and Community Development Act of 1974, it provided that funds "may" be used for relocation benefits to persons

displaced by activities funded by the Act. 42 U.S.C. § 5305. Thus Congress specifically considered the issue of relocation benefits and determined that block grant recipients could, but need not, provide such benefits. If Congress had intended to make such payments mandatory it could have so provided, either in the text of the Act itself, or by amending § 4637 of the Uniform Relocation Act to provide that persons who are forced to move from their dwellings as a result of projects funded under the block grant program would be deemed to have been displaced as the result of the acquisition of real property. Having done neither, it cannot be concluded that Congress intended that any person who is displaced as a result of a program funded under the Housing and Community Development Act of 1974 is entitled to relocation benefits pursuant to the Uniform Relocation Act.

Housing and Community Development Act of 1974

Plaintiffs' final argument is that they are entitled to relocation benefits under the terms of the Housing and Community Development Act of 1974 itself. Specifically, plaintiffs contend that HUD should not have approved the City's application for funding for the ICEP and CERP programs because (1) the programs are not designed to "principally benefit" persons of low or moderate incomes; and (2) the programs are "plainly inappropriate" to meeting the needs and objectives identified by the City in its block grant applications.

Section 5304(c) of 42 U.S.C. sets forth the standards by which the Secretary of HUD is to review applications for funding under the Housing and Community Development Act of 1974:

> "(c) The Secretary shall approve an application * * * unless—
>
> * * * * * *
>
> "(2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant * * * : or
>
> "(3) the Secretary determines that the application does not comply with the requirements of this chapter or other applicable law or proposes activities which are ineligible under this title."

[4] The courts have the power to review the Secretary's determinations under this section in order to correct abuses of discretion or actions which are clearly arbitrary and capricious. *Broaden v. Harris*, 451 F.Supp. 1215, 1225 (W.D.Pa.1978).

[5] Plaintiffs' argument that the City's block grant applications do not comply with the requirements of the Housing and Community Development Act of 1974 is without merit. Plaintiffs have attempted to show that a program which does not provide full relocation benefits to displaced tenants is not designed to "primarily benefit" low and moderate income persons as required by 42 U.S.C. § 5301(c). The fact, however, that low and moderate income persons are not benefitted to the extent that plaintiffs feel appropriate does not mean that they are not benefitted at all. The ICEP and CERP programs are designed to improve the housing stock in Milwaukee's blighted areas, to protect low income persons from the health and safety dangers that can result from living in substandard housing, and to provide relocation benefits to persons whose living quarters are in such poor condition that a raze order has been issued. All of these objectives primarily benefit low and moderate income persons and it was not an abuse of discretion on the part of the Secretary of HUD to so determine.

Nor is there merit to the argument that the City's application should have been disapproved because the ICEP and CERP are plainly inappropriate to the needs and objectives identified by the City. In its 1975 block grant application, the City identified the long term objective of CERP as follows:

> "Code enforcement relocation assistance will ensure that unreliable structures that are condemned for human habitation will promptly be razed on a routine basis. This will eliminate health, safety hazards, and blighting influences and facilitate renewal development by relocating households into decent, safe and sanitary housing as the Community's housing stock ages."

There is nothing about CERP, either on its face or as administered by the City, which is inappropriate to the fulfillment of this objective. Significantly, the City served

notice from the beginning that CERP would only provide relocation benefits in situations where the affected building was ordered to be razed. CERP, as implemented by the City, was not designed to provide benefits to every person displaced by code enforcement. The program *could* have been more broadly based, but it was not required to be. The question of how the benefits are to be administered is, within the framework of the community development block grant program, entirely up to the City. Any attempt to change the manner in which the benefits are to be administered must be mounted through the legislative rather than the judicial process.

IT IS THEREFORE ORDERED that the plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted.

62.17 Enforcement of building codes. For the purpose of facilitating enforcement of municipal and state building, plumbing, electrical and other such codes, ordinances or statutes established for the protection of the health and safety of the occupants of buildings referred to elsewhere in this section as "building codes", any municipality may adopt an ordinance with any of the following provisions:

(1) Requiring the owner of real estate subject to any building code to maintain with the register of deeds a current listing of such owner's address and the name and address of any person empowered to receive service of process for such owner. Any changes of names or address in such listing shall be reported within 10 days of such change. This subsection does not apply to owner-occupied one- and 2-family dwellings.

(2) Establishing as sufficient notice to an owner that a building inspector or agency entrusted with the enforcement of the building code has found a violation of any applicable building code, if the building inspector or agency, after making an unsuccessful attempt of personal service during daytime hours at the latest address listed with the register of deeds as that of the owner or agent of the owner, thereafter sends such notice by certified mail to the address noted and in addition posts a copy of the notice in a conspicuous place in or about the building where such violation exists. If the owner has not filed under sub. (1) with the register of deeds a current address or name and address of a person empowered to receive service of process, then posting of a notice of violation on the premises and certified mailing such notice to the last-known address of the owner as well as to the address of the premises in violation shall be deemed sufficient notice to such owner that a violation has been found.

(3) That when notice of a violation of the building code which is found by a building inspector or agency entrusted with the enforcement of the building code is made according to sub. (2), such notice shall be effective notice to anyone having an interest in the premises.

whether recorded or not, at the time of the giving of such notice; and shall be effective against any subsequent owner of the premises as long as the violation remains uncorrected and there exists a copy of the notice of violation in a public file maintained by the local agency charged with enforcement of the building codes.

(4) Requiring an owner to give notice to any prospective purchaser that a notice has been issued concerning a building violation, where the condition giving rise to the notice of violation has not been corrected; providing for a fine not exceeding $500 for failure to so notify; and granting the purchaser who has not received the required notice the right to make any repairs necessary to bring the property up to the requirements of the local building code and to recover the reasonable cost of those repairs from the seller.

66.05 Razing buildings; excavations. (1) (a) The governing body or the inspector of buildings or other designated officer in every municipality, except in towns situated in a county of less than 15,000 population upon complaint of a majority of the members of the town board the circuit court, may order the owner of premises upon which is located any building or part thereof within such municipality, which in its judgment is so old, dilapidated or has become so out of repair as to be dangerous, unsafe, insanitary or otherwise unfit for human habitation, occupancy or use, and so that it would be unreasonable to repair the same, to raze and remove such building or part thereof, or if it can be made safe by repairs to repair and make safe and sanitary or to raze and remove at the owner's option; or where there has been a cessation of normal construction of any building or structure for a period of more than 2 years, to raze and remove such building or part thereof. The order shall specify a time in which the owner shall comply therewith and specify repairs, if any. It shall be served on the owner of record or his agent where an agent is in charge of the building and upon the holder of any encumbrance of record in the manner provided for service of a summons in the circuit court. If the owner or a holder of an encumbrance of record cannot be found the order may be served by posting it on the main entrance of the building and by publishing as a class 3 notice, under ch. 985, before the time limited in the order commences to run.

(b) Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the state supervisor of assessments for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purposes of this section that such building is a public nuisance.

(c) Acts of municipal authorities under this section shall not increase the liability of an insurer.

(2) (a) If the owner fails or refuses to comply within the time prescribed, the inspector of buildings or other designated officer shall cause such building or part thereof to be razed and removed either through any available public agency or by contract or arrangement with private persons, or closed if unfit for human habitation, occupancy or use. The cost of such razing and removal or closing shall be charged against the real estate upon which such building is located and shall be a lien upon such real estate, and shall be assessed and collected as a special tax. When any building has been ordered razed and removed the governing body or other designated officer under said contract or arrangement aforesaid may sell the salvage and valuable materials at the highest price obtainable. The net proceeds of such sale, after deducting the expenses of such razing and removal, shall be promptly remitted to the circuit court with a report of such sale or transaction, including the items of expense and the amounts deducted, for the use of the person who may be entitled thereto, subject to the order of the court. If there remains no surplus to be turned over to the court, the report shall so state. If the building or part thereof is insanitary and unfit for human habitation, occupancy or use, and is not in danger of structural collapse the building inspector shall post a placard on the premises containing the following words: "This Building Cannot Be Used for Human Habitation, Occupancy or Use". And it is the duty of the building inspector or other designated officer to prohibit the use of the building for human habitation, occupany or use until the necessary repairs have been made.

(b) Any municipality, inspector of buildings or designated officer may, in his official capacity, commence and prosecute an action in circuit court for an order of the court requiring the owner to comply with an order to raze or remove any building or part thereof issued under this section if the owner fails or refuses to do so within the time prescribed in such order, or for an order of the court requiring any person occupying a building whose occupancy has been prohibited under this section to vacate the premises, or any combination of such court

orders. Hearing on such actions shall be given precedence over other matters on the court's calendar. Costs shall be in the discretion of the court.

(c) Any person who rents, leases or occupies a building which has been condemned for human habitation, occupany or use shall be fined not less than $5 nor more than $50 or imprisoned not more than 30 days for each week of such violation, or both.

(3) Anyone affected by any such order shall within the time provided by s. 893.76 apply to the circuit court for an order restraining the inspector of buildings or other designated officer from razing and removing the building or part thereof or forever be barred. Hearing shall be had within 20 days and shall be given precedence over other matters on the court's calendar. The court shall determine whether the order of the inspector of buildings is reasonable, and if found reasonable the court shall dissolve the restraining order, and if found not reasonable the court shall continue the restraining order or modify it as the circumstances require. Costs shall be in the discretion of the court. If the court finds that the order of the inspector of buildings is unreasonable, the inspector of buildings or other designated officer shall issue no other order pursuant to the authority of this section in regard to the same building or part thereof until its condition is substantially changed. The remedies provided in this subsection are exclusive remedies and anyone affected by such an order of the inspector shall not be entitled to recover any damages for the razing and removal of any such building.

(4) "Building" as used in this section includes any building or structure.

(5) If any building ordered razed or made safe and sanitary by repairs contains personal property or fixtures which will unreasonably interfere with the razing or repair of such building or if the razing of the building makes necessary the removal, sale or destruction of such personal property or fixtures the inspector of buildings or other designated officer may order in writing the removal of such personal property or fixtures by a certain date. Such order shall be served as provided in sub. (1). If the personal

property or fixtures or both are not removed by the time specified the inspector may store the same, or may sell it, or if it has no appreciable value he may destroy the same. In case the property is stored the amount paid for storage shall be a lien against such property and against the real estate and shall be assessed and collected as a special tax against the real estate if the real estate is owned by the owner of the personal property and fixtures. If the property is stored the owner thereof, if known, shall be notified of the place of its storage and if it be not claimed by the owner it may be sold at the expiration of 6 months after it has been stored. In case of sale the handling of the sale and the distribution of the net proceeds after deducting the cost of storage and any other costs shall be handled as specified in sub. (2) and a report made to the circuit court as therein specified. Anyone affected by any order made under this subsection may appeal as provided in sub. (3).

(5m) This section shall not limit powers otherwise granted to municipalities by other laws of this state.

(6) In any town, city or village in any county having a population of 500,000 or more no excavation for building purposes, whether or not completed, shall be left open for more than 6 months without proceeding with the erection of a building thereon. In the event any such excavation remains open for more than 6 months, the inspector of buildings or other designated officer in such town, village or city shall order that the erection of a building on the excavation begin forthwith or in the alternative that the excavation be filled to grade. The order shall be served upon the owner of the land or his agent and upon the holder of any encumbrance of record as provided in sub. (1). If the owner of the land fails to comply with the order within 15 days after service thereof upon him, the inspector of buildings or other designated officer shall cause the excavation to be filled to grade and the cost shall be charged against the real estate as provided in sub. (2). Subsection (3) shall also apply to orders issued under this subsection. This shall not be construed to impair the authority of any city or village to enact ordinances in this field.

(7) The action provided in sub. (1) for razing or removing a building on premises in a town situated in a county of less than 15,000 population shall be commenced in accordance with s. 801.02. The authenticated copy of the summons and the complaint shall be served upon the owner and occupant of and any holder of an encumbrance of record against the premises. Procedure shall be the same in all respects as the procedure in other civil actions so far as applicable. Subsection (3) shall not apply to such actions except the court may, upon a showing of hardship or other good cause, restrain for reasonable periods of time the razing or removal of a building or part thereof and the removal, sale or destruction of any personal property or fixtures therein. Costs shall be in the discretion of the court except as to persons found by the court to be acting maliciously in or about the commencement or prosecution of such action.

(8) (a) Whenever an owner of any building, dwelling or structure in any city or village permits the same, either as a result of vandalism or for any other reason, to deteriorate or become dilapidated or blighted to the extent where windows, doors or other openings or plumbing or heating fixtures or facilities or appurtenances of such building, dwelling or structure are either damaged, destroyed or removed so that such building, dwelling or structure offends the aesthetic character of the immediate neighborhood or produces blight or deterioration by reason of such condition, the building inspector or other designated officer of such city or village shall issue a written notice respecting the existence of such defect; such written notice shall be served on the owner of such building, dwelling or structure as set forth in sub. (1) (a) and shall direct the owner of such building, dwelling or structure to promptly remedy the defect within 30 days following the service of such notice.

(b) If such owner fails to remedy or improve the defect in accordance with the written notice furnished by the building inspector or other designated officer as set forth in par. (a), then after the expiration of the 30-day period specified in the written notice such building inspector or

other designated officer shall apply to the circuit court of the county in which such building, dwelling or structure is located for an order determining that such building, dwelling or structure constitutes a public nuisance. As a part of the application for such order from the circuit court such building inspector or other designated officer shall file a verified petition in which shall be recited the giving of such written notice, the defect or defects in such building, dwelling or structure, the owner's failure to comply with the notice and such other pertinent facts as may be related thereto. A copy of the petition shall be served upon the owner as provided in sub. (1) (a) and the owner shall have 20 days following service upon him in which to reply to such petition. Upon application by the building inspector or other designated officer the circuit court shall promptly set the petition for hearing. Testimony shall be taken by the circuit court with respect to the allegations of the petition and denials contained in the verified answer. If the circuit court after hearing the evidence with respect to the petition and the answer shall determine that the building, dwelling or structure constitutes a public nuisance, the court shall promptly issue an order directing the owner of such building, dwelling or structure to remedy the defect and to make such repairs and alterations as may be required. The court shall further set a reasonable period of time in which such defect shall be remedied and the repairs or alterations completed. A copy of such order shall be served upon the owner as provided in sub. (1) (a). The order of the circuit court shall state in the alternative that if the order of the court is not complied with within the time fixed by the court, then such building inspector or other designated officer may proceed to raze the building, dwelling or structure. All costs or disbursements with respect to such razing shall be as provided for in sub. (2) (a).

(c) Either the owner or the city or village may appeal to the court of appeals within 30 days from the date of entry of the order of the circuit court.

(d) Any building, which under par. (a) either as a result of vandalism or for any other reason is permitted to deteriorate or become dilapidated or blighted to the extent

where windows, doors or other openings or plumbing or heating fixtures or facilities or appurtenances of such building, dwelling or structure are either damaged, destroyed or removed so that such building, dwelling or structure offends the aesthetic character of the immediated neighborhood and produces blight or deterioration by reason of such condition, is a public nuisance.

(9) (a) In this subsection:

1. "Historic building" means any building, structure or object listed in, or any building, structure or object within and contributing to a historic district listed in, the national register of historic places in Wisconsin maintained by the U.S. department of the interior.

2. "Municipality" means a city, village, county or town.

(b) The state historical society shall notify a municipality of any historic building located in the municipality. If a historic district lies within a municipality, the historical society shall furnish to the municipality a map delineating the boundaries of the district.

(c) If an order is issued under this section to raze a historic building, an application is made for a permit to raze a historic building or a municipality intends to raze a municipally owned historic building, the municipality in which the historic building is located shall notify the state historical society of the order, application or intent. No historic building may be razed for 30 days after the notice is given. During the 30-day period, the state historical society shall have access to the historic building to create or preserve a historic record.

APPENDIX G

704.07 Repairs; untenantability. (1) APPLICATION OF SECTION. This section applies to any nonresidential tenancy if there is no contrary provision in writing signed by both parties and to all residential tenancies. An agreement to waive the requirements of this section in a residential tenancy is void. Nothing in this section is intended to affect rights and duties arising under other provisions of the statutes.

(2) DUTY OF LANDLORD. (a) Unless the repair was made necessary by the negligence or improper use of the premises by the tenant, the landlord is under duty to:

1. Keep in reasonable state of repair portions of the premises over which he maintains control;

2. Keep in a reasonable state of repair all equipment under his control necessary to supply services which he has expressly or impliedly agreed to furnish to the tenant, such as heat, water, elevator or air-conditioning;

3. Make all necessary structural repairs;

4. Except for residential premises subject to a local housing code, repair or replace any plumbing, electrical wiring, machinery or equipment furnished with the premises and no longer in reasonable working condition, except as provided in sub. (3) (b).

5. For a residential tenancy, comply with a local housing code applicable to the premises.

(b) If the premises are part of a building, other parts of which are occupied by one or more other tenants, negligence or improper use by one tenant does not relieve the landlord from his duty as to the other tenants to make repairs as provided in par. (a).

(c) If the premises are damaged by fire, water or other casualty, not the result of the negligence or intentional act of the landlord, this subsection is inapplicable and either sub. (3) or (4) governs.

(3) DUTY OF TENANT. (a) If the premises are damaged by the negligence or improper use of the premises by the tenant, the tenant must repair the damage and restore the appearance of the premises by

redecorating. However, the landlord may elect to undertake the repair or redecoration, and in such case the tenant must reimburse the landlord for the reasonable cost thereof; the cost to the landlord is presumed reasonable unless proved otherwise by the tenant.

(b) Except for residential premises subject to a local housing code, the tenant is also under a duty to keep plumbing, electrical wiring, machinery and equipment furnished with the premises in reasonable working order if repair can be made at cost which is minor in relation to the rent.

(c) A tenant in a residential tenancy shall comply with a local housing code applicable to the premises.

(4) UNTENANTABILITY. If the premise becomes untenantable because of damage by fire, water or other casualty or because of any condition hazardous to health, or if there is a substantial violation of sub. (2) materially affecting the health or safety of the tenant, the tenant may remove from the premises unless the landlord proceeds promptly to repair or rebuild or eliminate the health hazard or the substantial violation of sub. (2) materially affecting the health or safety of the tenant; or the tenant may remove if the inconvenience to the tenant by reason of the nature and period of repair, rebuilding or elimination would impose undue hardship on him. If the tenant remains in possession, rent abates to the extent the tenant is deprived of the full normal use of the premises. This section does not authorize rent to be withheld in full, if the tenant remains in possession. If the tenant justifiably moves out under this subsection, the tenant is not liable for rent after the premises become untenantable and the landlord must repay any rent paid in advance apportioned to the period after the premises become untenantable. This subsection is inapplicable if the damage or condition is caused by negligence or improper use by the tenant.

823.22 Property violating codes or health orders. **(1)** If real property in counties having a population of 100,000 or more is in violation of those provisions of a municipal building code which concern health or safety or of an order of the county health department, county health commission or municipal health board or officer, the city, village or town in which such property is located may commence an action to declare such property a public nuisance. A tenant or class of tenants of property which is in violation of the municipal building code or of an order of the county health department, county health commission or municipal health board or officer, or any other person or class of persons whose health, safety or property interests are or would be adversely affected by property which is in violation of the municipal building code or of an order of the county health department, county health commission or municipal health board or officer, may file a petition with the clerk of the city, village, or town requesting the governing body to commence an action to declare such property a public nuisance. Upon refusal or failure of such governing body to commence such an action within 20 days after the filing of the petition, the tenant, class of tenants, other person or other class of persons may commence such action directly upon the filing of security for court costs. In any such case, the court before which such action is commenced shall exercise jurisdiction in rem or quasi in rem over such property and the owner of record of the property, if known, and all other persons of record holding or claiming any interest therein shall be made parties defendant and service of process may be had upon them as provided by law. Any change of ownership subsequent to the commencement of the action shall not affect the jurisdiction of the court over such property. At the time of commencing the action, the municipality or other parties plaintiff shall file a lis pendens. If the court finds that such a violation exists, it shall adjudge the property a public nuisance and such an entry of judgment shall be a lien upon the premises.

(2) A property owner or any person of record holding or claiming any interest in such property shall have 60 days after entry of judgment to eliminate the violation. If within 60 days after entry of judgment under sub. (1), an owner of the property presents evidence satisfactory to the court, upon hearing, that the violation has been eliminated, the court shall set aside the judgment. It shall not be a defense to this action that the owner of record of the property is a different person, partnership or corporate entity than the owner of record of the property on the date the action was commenced or thereafter provided a lis pendens has been filed prior to the change of ownership. No hearing under this subsection shall be held until notice has been given to the municipality and all the plaintiffs advising them of their right to appear. If the judgment is not so set aside within 60 days after entry of judgment, the court shall appoint a disinterested person to act as receiver of the property for the purpose of abating the nuisance.

(3) (a) Any receiver so appointed shall collect all rents and profits accruing from the property, pay all costs of management, including all general and special real estate taxes or assessments and interest payments on first mortgages thereon, and make any repairs necessary to meet the standards required by the building code or any such health order. Such receiver may, with the approval of the circuit court, borrow money against and encumber said property as security therefor, in such amounts as are necessary to meet such standards.

(b) At the request of and with the approval of the owner, he may sell the property at a price equal to at least the appraisal value plus the cost of any repairs made under this section for which the selling owner is or will become liable therefor. The receiver shall apply moneys received from the sale of the property to pay all debts due on the property in the order set by law, and shall pay over any balance with the approval of the court, to the selling owner.

(4) The receiver appointed pursuant to this chapter shall have a lien, for the expenses necessarily incurred in the execution of the order, upon the premises upon or in

respect of which the work required by said order has been done or expenses incurred.

(5) The court shall set the fees and bond of the receiver, and may discharge him at such time as the court deems appropriate.

(6) Nothing in this section relieves the owner of any property for which a receiver has been appointed from any civil or criminal responsibility or liability otherwise imposed by law, except that the receiver shall be civilly and criminally responsible and liable for all matters and acts directly under his authority or performed by him or at his discretion.

(7) This section shall not apply to owner-occupied one or 2-family dwellings.

(8) The commencement of an action by a tenant pursuant to this section shall not be just cause for eviction.

Part 2. It is hereby found and declared that premises exist within the City of Milwaukee which are blighted because there exists thereon blighted buildings, or other structures, either occupied or unoccupied by human beings, and such buildings or other structures are blighted because faulty design or construction, or failure to keep them in a proper state of repair, or lack of proper sanitary facilities, or lack of adequate lighting or ventilation, or inability to properly heat, or improper management, or any combination of these factors has resulted in such buildings or structures becoming so deteriorated, so dilapidated, so neglected, so overcrowded with occupants, or so unsanitary as to jeopardize or be detrimental to the health, safety, morals, or welfare of the people of the city. It is hereby further found and declared that such blighted premises and such blighted buildings or other structures contribute to the development of, or increase in, disease, infant mortality, crime and juvenile delinquency; that conditions existing on such blighted premises are dangerous to the public health, safety, morals, and general welfare of the people, that conditions existing on such blighted premises necessitate excessive and disproportionate expenditure of crime prevention, fire protection, and other public services; that the conditions existing on blighted premises cause a drain upon public revenue and impair the efficient and economical exercise of governmental functions in such areas. It is hereby further found and declared that the elimination of blighted premises and the prevention of occurrence of blighted premises in the future is in the best interests of the citizens of this city, of the State of Wisconsin, and of the entire United States; and that the accomplishment of this end will be fostered and encouraged by the enactment and enforcement of this ordinance.

The Statement of Purpose of the City of Milwaukee's housing code was originally codified at § 75-2 of the Milwaukee Code of Ordinances and subsequently was repealed and codified throughout the present Chapter 51 of the Milwaukee Code of Ordinances.

APPENDIX J

12-4. Notices of Code Violations; Emergency Orders; Essential Services Orders. (1) ISSUANCE OF VIOLATION NOTICE. Whenever the Commissioner of Building Inspection determines that there exists a violation or has reasonable grounds to believe that a violation of the Building Maintenance Code (Chapter 51) has occurred, or that a dwelling or dwelling unit is unfit for human habitation, he shall give notice to the owner or the person(s) responsible therefor in a manner prescribed hereafter. If he has condemned the property or part thereof, he shall give notice to the owner and to the occupants of his intention to placard and vacate the property.

(2) ISSUANCE OF ORDERS. Whenever the Commissioner of Building Inspection determines that there exists a violation or has reasonable grounds to believe that a violation exists in any building or structure or in the use of any equipment covered by this code except as set forth in subsection (1) above, the Commissioner of Building Inspection shall order, in a manner prescribed hereafter, the owner or person responsible therefor to correct same. If placard action is warranted, it shall be as prescribed in Section 12-3(6).

(3) NOTICE AND ORDER FORMAT. (a) All notices and orders shall be issued in the following manner:

1. They shall be in writing.

2. They shall include a description of the real estate sufficient for identification.

3. They shall include a statement of the reason for said action.

4. They shall allow a reasonable time for correction of code violations.

5. If the Commissioner desires, they shall contain an outline of remedial action which, if taken, will effect compliance with the provisions of the code and rules and regulations adopted pursuant thereto.

6. They shall advise the owner or occupant of his right of appeal.

Note: Appeal procedures are normally printed on the front or back side of the notice or order.

7. They shall be served upon the owner, the operator or occupant, or agent, provided that such notice shall be deemed to be properly served upon such owner, agent, operator or occupant, if a copy thereof is delivered to him or her personally, or, if not found, by leaving a copy thereof at his or her usual place of abode in the presence of someone of the family of suitable age and discretion who shall be informed of the contents thereof; or by sending a copy thereof by certified mail with a return receipt requested to his or her last known address, or, if the certified letter with the copy is returned with a receipt showing it had not been delivered, by posting a copy thereof in a conspicuous place on or about the dwelling affected; or, as otherwise specified in this code.

8. In all cases involving nonowner occupied one-family and two-family dwellings the notice or order shall be served as indicated below:

a. By personal service on the owner or his registered agent.

b. After failure of personal service attempted during daytime hours at the latest address listed with the Register of Deeds for the owner or his or her agent, services shall be by sending such notice or order by certified mail, no return receipt requested, to the address noted, and, in addition, by posting a copy of the notice in a conspicuous place in or about the building where the violation exists.

c. If the owner has not filed with the Register of Deeds his current address or the name and address of the person empowered to receive service of process, it shall be deemed sufficient notice to such owner that violations have been found if the notice or order of violations is posted on the premises in violation and copies are sent by certified mail, no return receipt requested, to the last known owner.

d. When service has been completed in the manner prescribed above, such notice shall be effective notice to anyone having interest in the property whether recorded or not at the time of giving such notice; and shall be effective against any subsequent owner of premises as long as the violation exists and there remains an official copy of the notice in a public file maintained by the Commissioner of Building Inspection.

e. For service of notices involving owner occupied one-family and two-family dwellings, see Section 12-4(3)(a)7.

12-14. Penalties. Any person, being the owner, or controlling or managing any building or premises or tenant thereof, wherein or whereon there shall be placed or there exists anything in violation of any of the regulations of this code (see also Sections 12-2, 12-3, and 12-4); or who shall build contrary to the plans and specifications submitted to and approved by the Commissioner of Building Inspection; or who shall omit, neglect, or refuse to do any act required in this code, except where special penalty is provided, shall be subject to a fine of not less than twenty-five dollars ($25) nor more than five hundred dollars ($500), together with the cost of the action, and in default of payment thereof to imprisonment in the house of correction or county jail of Milwaukee County, for a period of not less than two days nor more than six months, or until such fine and cost shall be paid; and every person shall be deemed guilty of a separate offense for each day such violation, disobedience, omission, neglect, or refusal shall continue, provided, however, that said accumulated penalties recoverable in any one action shall not exceed the sum of two thousand dollars ($2,000).

12-17. Rent Withholding. (1) NONCOMPLIANCE. *(a) Deposit in Escrow.* Notwithstanding any other provision of law or any agreement, whether oral or written, if a lessor of residential premises, except rooming houses licenced under Section 51-20 of the code, or owner-occupied two-family dwellings, within the city of Milwaukee fails or neglects to comply with an order of the Commissioner of Building Inspection to correct a violation of the Milwaukee Building and Zoning Code, the Commissioner of Building Inspection must, upon the expiration of the original notice of such violation, authorize the lessee of said premises in writing to deposit his rental payments into an escrow account designated by the Commissioner of Building Inspection. The only violations which shall be exempt from the provisions of this section shall be those requiring

only minor exterior maintenance, such as exterior painting. Reasonable time shall be set by the Commissioner of Building Inspection.

(b) Proper Appeal. Authorization by the Commissioner of Building Inspection to deposit rental payments into an escrow account pursuant to Section 12-17(1)(a) above shall be stayed in the event that a proper appeal is made to the Building Maintenance Code Enforcement and Appeals Board in the manner and within the time period provided by Section 12-11 of this code. In hearing such appeals the Board shall have the power to affirm or reverse the authorization of rent withholding or extend the time for the commencement of rent withholding. The Board, and only said Board, shall have the power to determine which, if any, of said violations was caused by the negligence of the tenants and, in such event, shall make a specific finding of such fact; however, this finding shall not affect the responsibility of the party charged with the duty under the code to repair and correct such violations, but the Board shall authorize rent withholding under this section in such instances to continue only until such nontenant caused violations are certified as corrected by the Commissioner of Building Inspection.

(2) DEPOSIT BY LESSEE. The right of lessee to deposit his rental payments into the escrow account established by this section shall not preclude or effect in any way his right to avail himself of any of the remedies provided by the laws of the state of Wisconsin pertaining to the relationship of landlord and tenant.

(3) RELEASE OF FUNDS. Monies deposited in the escrow account shall be released under the following terms and conditions:

(a) To the lessor upon certification by the Department of Building Inspection of the city of Milwaukee that all violations of the Building and Zoning Code have been completely corrected. Certification shall be deemed to mean that the premises, at the time of inspection for certification, are free of any violation of the Building and Zoning Code; or

(b) Monies deposited in such escrow account may also be pledged by the landlord or his agent as security for the cost for the making of whatever repairs are required in order to completely correct all the existing violations on the premises, or such monies may also be released by the escrow agent upon presentation to said escrow agent of the billing for the work approved or countersigned by the Department of Building Inspection of the city of Milwaukee and the certification by the Department of Building Inspection of the city of Milwaukee that the repair work has been done; or

(c) To any receiver for the premises appointed under Section 280.22 of the Wisconsin Statutes.

(4) APPLICABILITY. The provisions of Section 12-4 and 12-11 of the Milwaukee Code relating to enforcement, notice and hearings applicable to orders issued by the Commissioner of Building Inspection are hereby made applicable to orders issued by the Commissioner of Building Inspection pursuant to this section.

(5) EVICTION OR RETALIATION. *(a) Prohibited.* No person or lessee who complains to the Commissioner of Building Inspection of violations of this code or complies with this section shall be evicted for nonpayment of rent or because said person or lessee has elected to act under said section, so long as rent is being deposited by that lessee in the escrow account approved by the city for the receipt of such rental amounts.

(b) Penalty. No person, tenant, or lessee shall be evicted or retaliated against for complaining of violations of this code or for complying with this section, and it shall be presumed that an attempt to terminate the tenancy of such lessee or to evict such lessee or to raise such lessee's rental payments or to otherwise harass or retaliate against such tenant during the period from the first complaint to the Commissioner of Building Inspection to twelve (12) months after the certification of the Department of Building Inspection of the city of Milwaukee that all violations have been corrected is done in retaliation for the lessee's complaint to the Commissioner of Building Inspection of a violation of this code or for his or her compliance with this section and is hereby declared null

and void and subject to a fine of not less than fifty dollars ($50) nor more than three hundred dollars ($300) for each such attempt; provided, however, that such a lessee's failure to pay rent into the escrow account when due or if the lessee commits waste upon the property. It is further provided that in order to overcome such presumption, the lessor must show by a preponderance of the evidence that such acts by him were based upon good cause; "good cause" as used herein means that the lessor must show a good reason for his action, other than one related to or caused by the operation of this ordinance, such as normal rental increases due to tax increases or increased maintenance costs.

(6) PROSECUTION. It is the intent of this section that any use of rent withholding will not prohibit the Commissioner of Building Inspection from prosecuting violations of the code relating to said property.

(7) COERCION. (a) Any person who accepts, as a result of harassment or coercion, rental payments for premises subject to rent withholding under this ordinance shall be subject to a fine of not less than fifty dollars ($50) nor more than three hundred dollars ($300) whether said rental payments are tendered by or on behalf of the lessee occupying the premises at the time rent withholding is authorized or by, or on behalf of, any subsequent or other lessee who occupies the premises during the existence of such rent withholding authorization. Each such payment accepted shall constitute a separate violation.

(b) Any tenant who willfully and maliciously uses or attempts to use this ordinance to harass a lessor shall be fined not less than fifty dollars ($50) nor more than three hundred dollars ($300).

12-16. Maintenance of Essential Services in Residential Rental Premises. (1) STATEMENT OF FINDINGS, INTENT AND PURPOSES. The mayor and common council of the city of Milwaukee do and hereby find that there has existed and do exist many instances where owners of residential properties have failed to provide essential services, make necessary repairs or provide needed maintenance of structures or equipment,

which create emergency situations that constitute an immediate threat to the health, safety, property and welfare to citizens of the City of Milwaukee and that in order to ensure proper maintenance of the equipment and systems that provide essential services to such residents and enforce the provisions of Chapter 51 of the Code, it is necessary in specified emergencies to authorize the Commissioner of Building Inspection to enter upon the premises to make certain repairs and to recover the cost of such activity from owner or responsible agent.

(2) EMERGENCY CONDITIONS. Whenever an emergency condition exists upon residential rental property with the City of Milwaukee, whether owner-occupied or nonowner occupied, which results in the equipment and systems necessary to supply such premises or units of such premises with heat, hot water, electricity or sanitary facilities becoming so defective that in the opinion of the Commissioner of Building Inspection such condition constitutes an immediate hazard and danger to the health, property or safety of the occupant, the Commissioner of Building Inspection shall act according to the provisions of this section unless either of the following two factors are present:

(a) The cost of proceeding under this section would exceed forty percent (40%) of the assessed market value of the property as last determined by the Tax Assessor; or

(b) The time needed to either complete repair or correction of the emergency condition or to, at least, effect temporary code complying measures adequate to protect the health and safety of the occupant(s), will exceed forty (40) days. In the event either of these two factors are present, the Commissioner of Building Inspection may, in his exercise of sound discretion, elect not to proceed pursuant to this ordinance and may utilize any other remedy available to him under law as he may deem it appropriate.

"Emergency condition" for the purpose of this ordinance shall mean: Any condition dangerous or injurious to the health or safety of the occupants of a building, or occupants of neighboring buildings, which arises out of any of the following conditions:

1. Either a mechanical failure of the heating system or such inefficient operation of such system that it fails to maintain a minimum of 60 degrees F. inside the unit, provided that enforcement of Section 51-61(1)(b) of the Code shall not be affected by this section.

2. Lack of adequate water supply, including hot water, provided that the 24-hour notice periods applicable under subsection (3)(a) and (3)(b) below shall be read as seventy-two (72) hours and eighty-four (84) hours respectively when the condition involves hot water supply only.

3. Structural, mechanical or electrical defects which increase the hazards of fire, accident, health or other calamity.

4. Lack of adequate and properly functioning sanitary facilities.

(3) REPAIRING ESSENTIAL SERVICES. If the Commissioner of Building Inspection determines that an emergency condition described in subsection (2) exists, and neither of the two factors listed above in subsection (2) are present, or if either is present, he elects to proceed under this ordinance, he shall issue an emergency order pursuant to Section 12-4 of the Code specifically describing the violations to be corrected and the action to be taken if the order is not complied with, and attempt to immediately serve said order on the owner and/or such owner's agent responsible for the maintenance and repair of such equipment or systems. Whenever such a condition exists, the Commissioner of Building Inspection must immediately proceed to enter upon said premises and repair or cause to have repaired such condition, in a workman-like manner by a licensed contractor, provided, however, that before he may so act, one of the two conditions precedent set forth below must have been met:

(a) The Commissioner of Building Inspection has been unable to give actual notice of the existence of such condition within the twenty-four (24) period following the discovery of its existence to the owner and/or such owner's agent responsible for the maintenance and repair of such equipment and system despite having employed his best efforts, including telephone calls and personal service, in his attempts to do so; or

(b) The owner and/or such owner's agent responsible for the maintenance and repair of such equipment and systems after having been so notified of the existence of such condition by the Commissioner of Building Inspection fails to begin to remedy such condition within twenty-four (24) hours of their having actual knowledge of having been so notified by the Commissioner of Building Inspection, or having so begun has not completed said repairs to remedy such condition within one hundred and twenty (120) hours.

(c) If repairs have not been completed pursuant to subsection (3)(b), but temporary code complying measures have been taken which adequately protect the safety and health of the occupant(s), the Commissioner of Building Inspection may extend, by no more than forty-eight (48) hours the time period for completion of repairs prior to commencing to make the repairs himself pursuant to this ordinance.

(4) EVICTION ORDERS. The Commissioner of Building Inspection shall not utilize this ordinance to affect such repairs when the unit is occupied by anyone in contravention of a valid court order issued pursuant to Section 299.44, Wisconsin Statutes, unless such repair is required to protect the health and safety of other occupants not subject to such an order.

(5) TEMPORARY EMERGENCY HOUSING. Wherever an emergency condition described in subsection (2) exists, or wherever there is probable cause to believe that such a condition exists, and that in the opinion of the Commissioner of Building Inspection such condition cannot be remedied in time to alleviate a hazard and danger to the health and safety of the occupant(s), the Commissioner of Building Inspection shall, in addition to effecting repairs pursuant to this ordinance, refer said occupant(s), where necessary, to such temporary housing as he determines to be available. Whenever the Commissioner of Building Inspection makes such a referral, he must act immediately pursuant to subsection (3) of this ordinance.

(6) FUND FOR ESSENTIAL SERVICE EMERGENCIES. The Comptroller shall set aside a fund

for costs incurred by the Commissioner of Building Inspection in enforcing this ordinance by causing essential service repairs to be made, as provided in subsection (3).

(7) RECOVERY OF COSTS BY CITY. If, as a result of the enforcement of subsection (3), the Commissioner of Building Inspection expends monies of the city of Milwaukee via the fund established in subsection (6), he must absent either payment or some binding written agreement for payment by the said owner or such owner's agent responsible for the maintenance and repair of such systems and equipment:

(a) Institute within thirty (3) days of completion of the repairs a court action to recover from such person an amount sufficient to compensate the city for the expense and labor in making such repairs as well as administrative costs, incurred as a result thereof. Administrative costs shall be deemed to be no less than fifty dollars ($50) per hour per inspector field hour incurred pursuant to actions under this section. Additionally, damages shall also include, but not be limited to, costs incurred by the city in providing temporary relocation housing and assistance to the occupant under this ordinance; or

(b) Following proper notice and opportunity for a hearing before the Building Maintenance Code Enforcement and Appeals Board as provided for in Section 12-11, to said owner's property taxes assessed upon the premises involved in a charge sufficient to compensate the city in an amount equal to that computed under subsection (7)(a) above. In the event a judgment under subsection (7)(a) is satisfied, such tax assessment shall be deemed satisfied also vice-versa.

(8) RETALIATION PROHIBITED. No non-owner occupant of premises that becomes the subject of activity by the Department of Building Inspection under this ordinance shall be evicted or retaliated against for having notified the Department of Building Inspection of the existence of such conditions or for having been the occupant at the time the Commissioner of Building Inspection took such action, and it shall be presumed that any attempt to terminate the tenancy, or to increase charges, or to reduce services or to refuse to renew a rental

agreement, or to otherwise harass or retaliate against such occupant or to reduce the level of services being rendered to such occupant during the period from the first complaint to the Commissioner of Building Inspection to twelve (12) months after complete reimbursement to the city for the costs incurred by it in acting under this ordinance is done in retaliation and is null and void and subject to a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500) for each such attempt; provided, however, that such an occupant may be evicted for his or her failure to pay rent, or if the occupant commits waste upon the property, or if the occupant commits a substantial violation of a written rental agreement. It is further provided that in order to overcome such presumption, it must be shown by a preponderance of the evidence that such acts were based upon good cause; "good cause" as used herein means that one must show a good reason for his or her actions, other than one related to or caused by the operation of this ordinance, including but not limited to normal rental increases due to tax increases or increases in maintenance costs.

(9) REVIEW. Records shall be kept by the Building Inspection Department and an annual report provided to the common council which would indicate whether this ordinance is effective.

(10) REMEDIES. Remedies provided under this ordinance are not to be construed to be exclusive of any other remedy available under this code but are considered to be cumulative.